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No.

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
October Term 1990

PATRICK W. SIMMONS, McLAY GRAIN COMPANY,  
and EDENFRUIT PRODUCTS COMPANY,  
*Petitioners*

v.

INTERSTATE COMMERCE COMMISSION, UNITED  
STATES OF AMERICA, CHICAGO AND NORTH  
WESTERN TRANSPORTATION COMPANY, and  
CHICAGO-CHEMUNG RAILROAD CORPORATION,  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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DECEMBER 1990



## **QUESTIONS PRESENTED**

1. Whether a representative of rail carrier employees having an interest in employee job protection, has standing to petition for review of Interstate Commerce Commission orders upholding the validity of a rail line acquisition and a rail line abandonment.

2. Whether rail shippers have standing to seek judicial review of an Interstate Commerce Commission order upholding the validity of a rail line abandonment where overturning the ICC order will not in itself restore train service over the line.

(ii)

## **LIST OF PARTIES**

The parties are listed in the caption. There are no parents or subsidiaries of petitioner corporations. Rule 29.1.



## TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	3
1. Background .....	3
2. The ICC's Acquisition Case .....	4
3. The ICC's Abandonment Case .....	5
4. The Court of Appeals Decision .....	7
A. Acquisition Decision .....	7
B. Dissent by Judges Cudahy & Ripple .....	10
C. Abandonment Decision .....	12
REASONS FOR GRANTING THE WRIT .....	13
I. THE DECISION OF THE COURT OF APPEALS IN THE <i>ACQUISITION</i> CASE CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE PRACTICE OF LOWER COURTS FOR DECADES .....	14

II. THE DECISION IN THE <i>ABANDONMENT</i> CASE IS SUBJECT TO THE SAME INFIRMITY AS THE <i>ACQUISITION</i> DECISION, AND IS ALSO IN CONFLICT WITH THIS COURT'S DECISION IN <i>KALO BRICK</i> .....	19
CONCLUSION .....	21
APPENDIX .....	1a
APPENDIX A	
Orders Extending Time To File Petition for Writ .....	1a
APPENDIX B	
Court of Appeals Opinion ( <i>Acquisition</i> ) 909 F.2d 186, decided April 16, 1990 with order and dissent on rehearing, decided August 2, 1990 .....	3a
Court of Appeals Opinion ( <i>Abandonment</i> ), 900 F.2d 1023, decided April 16, 1990 .....	18a
APPENDIX C	
Court of Appeals Order denying intervention ( <i>Acquisition</i> ), filed December 13, 1989 .....	27a
APPENDIX D	
Decision of Interstate Commerce Commission. Finance Docket No. 31110, Chicago-Chemung Rail- road Corporation-Exemption, Acquisition and Operation-Rail Line of Chicago and North Western Company Between Harvard and Chemung in McHenry County, IL, decided September 22, 1987 (served September 29, 1987) .....	29a

*Ibid.*, decided March 14, 1988 (served March 18, 1988) ..... 35a

*Ibid.*, decided September 12, 1988 (served September 16, 1988) ..... 48a

Decision of Interstate Commerce Commission.  
Docket No. AB-1 (Sub-No. 221X), Chicago and  
North Western Transportation Company-  
Abandonment Exemption-Boone County, IL,  
decided November 10, 1988 (served November 10, 1988) ..... 56a

*Ibid.*, decided April 27, 1989 (served May 8, 1989) .... 63a

## APPENDIX E

Court of Appeals Order denying rehearing  
(*Abandonment*), entered August 2, 1990 ..... 74a

## APPENDIX F

### Statutes:

49 U.S.C. 10101a ..... 75a

49 U.S.C. 10328(a) ..... 77a

49 U.S.C. 10505(a) & (g) ..... 77a

49 U.S.C. 10901(e) ..... 77a

49 U.S.C. 10903(b)(2) ..... 78a

49 U.S.C. 11344(b)(1) ..... 78a

49 U.S.C. 11347 ..... 79a

## TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>American Trucking Assns. v. U.S.</i> , 352 U.S. 816 (1956) and 355 U.S. 141 (1957) . . . . .	11, 14
<i>Asbury v. Chesapeake and Ohio Railway Company</i> , 264 F.Supp. 437 (D.D.C. 1967) . . . . .	20
<i>Asbury v. United States</i> , 298 F.Supp. 589 (W.D.Va. 1969) . . . . .	20
<i>Black v. ICC</i> , 762 F.2d 106 (D.C. Cir. 1985) . . . . .	7
<i>Broth. of Ry. Carmen (Div. of UTU) v. ICC</i> , 917 F.2d 1136 (8th Cir. 1990) . . . . .	7
<i>Chicago &amp; N.W. Tr. Co. v. Kalo Brick &amp; Tile Co.</i> , 450 U.S. 311 (1981) . . . . .	19
<i>Class Exemption-Acq. &amp; Oper. of R. Lines</i> <i>Under 49 U.S.C. 10901</i> , 1 I.C.C.2d 810 (1985), 4 I.C.C.2d 309 (1988) and 4 I.C.C.2d 822 (1988) aff'd Illinois Commerce Com'n v. ICC, 817 F.2d 145 (D.C. Cir. 1987) . . . . .	4, 17
<i>Clarke v. Securities Industry Assn.</i> , 479 U.S. 388 (1987) . . . . .	8, 15
<i>Commission v. Sanders Radio Station</i> , 309 U.S. 470 (1940) . . . . .	10
<i>Exemption of Out of Service Rail Lines</i> , 366 I.C.C. 885 (1983), 1 I.C.C.2d 55 (1984), and 2 I.C.C.2d 146 (1986) . . . . .	5

<i>Illinois Commerce Com'n v. ICC</i> , 787 F.2d 616 (D.C. Cir. 1986) and 848 F.2d 1246 (D.C. Cir. 1988), cert. den. 109 S.Ct. 783 .....	5
--	---

## **U.S. Constitution:**

Article III .....	<i>passim</i>
-------------------	---------------

## **Statutes:**

5 U.S.C. 702 .....	14
28 U.S.C. 1254 .....	2
28 U.S.C. 2101 .....	2
28 U.S.C. 2350 .....	17
49 U.S.C. 17(11) (1975) .....	14
49 U.S.C. 10101 .....	3, 8
49 U.S.C. 10101a .....	2, 16, 17
49 U.S.C. 10328 .....	2, 14
49 U.S.C. 10505 .....	2, 17
49 U.S.C. 10722 .....	17
49 U.S.C. 10746 .....	5, 18
49 U.S.C. 10901 .....	2, 16, 17
49 U.S.C. 10903 .....	2, 16, 17
49 U.S.C. 10910 .....	17

49 U.S.C. 11103 .....	17
49 U.S.C. 11125 .....	17
49 U.S.C. 11322 .....	7
49 U.S.C. 11343 .....	17
49 U.S.C. 11344 .....	2, 16
49 U.S.C. 11347 .....	2, 16
49 U.S.C. 11350 .....	17

**Regulations:**

49 CFR 1150 .....	4
49 CFR 1152 .....	5

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PATRICK W. SIMMONS, McLAY GRAIN COMPANY,  
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v.

INTERSTATE COMMERCE COMMISSION, UNITED  
STATES OF AMERICA, CHICAGO AND NORTH  
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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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Petitioners, Patrick W. Simmons,<sup>1</sup> McLay Grain Company, and Edenfruit Products Company,<sup>2</sup> respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit, entered in the proceedings on April 16, 1990, and August 2, 1990.<sup>3</sup>

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<sup>1</sup>Illinois Legislative Director for United Transportation Union.

<sup>2</sup>McLay Grain Company and Edenfruit Products Company, are two railroad shippers located at Poplar Grove, IL, each with a siding served by respondent Chicago & North Western Transportation Company.

<sup>3</sup>This petition for writ of certiorari embraces two cases that involve closely related questions, and were decided simultaneously by the court below. Rule 12.2.

## OPINIONS BELOW

The opinions of the court of appeals are reprinted in the Appendix at App. B. The opinions, including that on petition for rehearing, in the first case (Harvard-Chemung) (*Acquisition*) are set forth (App. B, 3a-17a) and reported at 900 F. 2d 186;<sup>4</sup> the opinion in the second case (Chemung-Poplar Grove (*Abandonment*)) is set forth (App. B, 18a-26a) and reported at 900 F.2d 1023.

The decisions of the Interstate Commerce Commission are set forth (App. D, 29a-73a) and are unreported.

## JURISDICTION

The judgments of the courts of appeals in both cases were entered April 16, 1990. Timely petitions for rehearing in both cases were denied on August 2, 1990. (App. B, 12a-13a; App. E, 74a).

The petitioners' time within which to file this petition was extended to November 30, 1990, and further extended to December 14, 1990, by orders of Mr. Justice Stevens dated October 20 and November 20, 1990. (App. A, 1a-2a).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). *See also*: 28 U.S.C. 2101(c), 2350(a).

## STATUTES INVOLVED

The statutes primarily involved are 49 U.S.C. 10101a, 10328(a), 10505(a) & (g), 10901(e), 10903(b)(2), 11344(b)(1) and 11347, and are set forth in the Appendix (App. F, 75a-79a).

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<sup>4</sup>Supersedes opinion reported at 900 F.2d 1018.



## STATEMENT OF THE CASE

The court of appeals ruled that a railroad labor union lacks standing to challenge orders of the Interstate Commerce Commission (ICC) issued under the Interstate Commerce Act, 49 U.S.C. 10101, *et seq.*, involving the acquisition by a newly-formed non-carrier, Chicago-Chemung Railroad Corporation (CCRC), of a 3.5-mile rail segment owned and operated by Chicago and North Western Transportation Company (C&NW) between Harvard and Chemung, IL. 909 F.2d at 190 (App. B, 10a); and the court of appeals likewise found the union lacked standing with respect to the abandonment of an adjoining 6.5-mile segment between Chemung and Poplar Grove, IL. 900 F.2d at 1026. The court below also ruled in the abandonment case that shippers lacked standing to challenge the abandonment because the Chemung-Poplar Grove line segment is inoperable due to a derailment, so that reversal of the ICC's abandonment decision would not address the shippers' alleged injury. 900 F.2d at 1026 (App. B, 24a).

Judge Cudahy, joined by Judge Ripple, filed a vigorous dissent on petition for rehearing en banc, in the *Acquisition* case, 909 F.2d at 193 (App. B, 17a):

This case presents a very difficult and important question — one which deserves the consideration of the entire court.

1. *Background.* C&NW for a number of years has attempted to abandon its 23.4-mile line between Harvard and So. Beloit, IL. On two occasions, in 1981 and in 1987, its applications for abandonment drew substantial protest, causing C&NW to withdraw its applications. However, rather than file a third application for abandonment, C&NW instituted a series of transactions to trifurcate the line into three segments. These efforts were (1) transfer of the eastern 3.5-mile Harvard-

Chemung segment for acquisition and operation by CCRC; (2) use of the out-of-service class abandonment exemption for the summary abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 13.4-mile Poplar Grove-Beloit segment. 909 F.2d at 187-88 (App. B, 4a-5a); 900 F.2d at 1024 (App. B, 19a).

The resulting *Acquisition* and *Abandonment* proceedings at the ICC, and then in the court below, involve the eastern Harvard-Chemung segment and the middle Chemung-Poplar Grove segment. C&NW thus far has not filed for abandonment of the western Poplar Grove-So. Beloit segment.

2. *The ICC's Acquisition Case.* CCRC is closely affiliated with Seegers Grain, Inc. (Seegers), the latter having grain facilities proximate to Chemung, and which could be connected to the Harvard-Chemung line. (App. B, 41a, 45a-46a). C&NW and CCRC entered into an agreement for CCRC to acquire C&NW's 3.5-mile Harvard-Chemung segment by means of the class exemption for line acquisitions, which permits a non-carrier to acquire a line on 7-days notice. 49 CFR 1150.31-.35. *See: Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd Illinois Commerce Com'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).<sup>5</sup>

The United Transportation Union (UTU), through its Illinois Legislative Director, Patrick W. Simmons, sought a stay of the acquisition, which was denied by the ICC. Finance Docket No. 31110, *Chicago-Chemung Railroad Corporation-Exemption, Acquisition and Operation-Rail Line of Chicago and*

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<sup>5</sup>The required notice period has been expanded for larger acquisitions which would create a Class II or Class I rail carrier. *See: Ibid.*, 4 I.C.C.2d 309 and 4 I.C.C.2d 822 (1988).

*North Western Transportation Company Between Harvard and Chemung in McHenry County, IL* (Sept. 29, 1987).<sup>6</sup>

UTU, joined by statements from Dean Foods Company, a shipper on the Harvard-Chemung segment, and by statements from McLay Grain Company (McLay) and Edenfruit Products (Edenfruit), shippers on the Poplar Grove-So. Beloit segment, petitioned to revoke the exemption. A number of objections to the CCRC acquisition were raised, including the competitive relations between grain shippers which would result from Seegers' control of CCRC, and the so-called "commodities clause," 49 U.S.C. 10746; the viability of CCRC as a substitute for C&NW; and the impact upon C&NW shippers at Poplar Grove in defending against C&NW's anticipated abandonment request for the western Poplar Grove-So. Beloit segment; and restoration of the damaged Chemung-Poplar Grove segment.

The ICC on March 14, 1988 denied the petition to revoke the acquisition exemption (App. D, 35a-47a), and the ICC on September 12, 1988, denied reopening. (App. D, 48a-55a).

3. *The ICC's Abandonment Case.* Some two weeks after the ICC denied the request to reopen its decision in the *Acquisition* case, C&NW on September 26, 1988, filed its notice for automatic abandonment of the middle Chemung-Poplar Grove segment. C&NW's notice was filed under the class abandonment exemption for so-called "out-of-service" lines. 49 CFR 1152.50 See: *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) and 1 I.C.C.2d 55 (1984), *rem. Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986); *Exemption of Out of Service Rail Lines*, 2 I.C.C. 2d 146 (1986), *aff'd Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. den.* 109 S. Ct. 783.

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<sup>6</sup>The ICC's reference to the date of its decisions is by the "service" date, whereas the court of appeals often uses the "decided" date. References in this petition are to the court's date for the ICC decisions.

An "out-of-service" line does not mean that traffic is not handled on the line segment, but only that no traffic originated or terminated on the line segment. The exemption requires only that no such local traffic has moved for at least two years, and any overhead traffic can be rerouted over other lines, and that no user of rail service has complained. 900 F.2d at 1024 (App. B, 20a).

McLay, Edenfruit, and UTU petitioned for stay of the abandonment on the ground that abandonment of the Chemung-Poplar Grove segment would prejudice the ultimate disposition of the Harvard-Chemung acquisition proceeding, and the forthcoming abandonment of the Poplar Grove-So. Beloit segment, and constitutes an abuse of the exemption provisions. The ICC on November 10, 1988 denied the stay request by a divided 3-to-1 vote, with a dissenting expression. Docket No. AB-1 (Sub-No. 221X), *Chicago and North Western Transportation Company-Abandonment Exemption-Boone County, IL* (App. D, 56a-62a). The majority stated it was unclear how the shippers would be prejudiced in the Harvard-Chemung case or in the forthcoming Poplar Grove-So. Beloit case. The dissenting commissioner stated the Poplar Grove shippers face impending abandonment of the circuitous service they now receive. 900 F.2d at 1025 (App. B, 21a); App. D, 56a-62a.

The ICC on May 8, 1989 denied the McLay-Edenfruit-UTU petition to revoke the abandonment exemption, by a divided 3-to-2 vote. The majority concluded that even if C&NW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the Chemung-Poplar Grove operation. 900 F.2d at 1025 (App. B, 21a-22a); App. D, 63a-73a.<sup>7</sup> The separate dissenting expressions of the

<sup>7</sup>This finding of no C&NW incentive to repair the derailment is in marked contrast with the ICC's earlier finding to the contrary, "There is nothing of record to suggest that CNW will not repair the track disruption." (*Acquisition*, App. D, 31a).

two commissioners highlighted the apparent purpose of C&NW to abandon the entire remaining line. (App. D, 72a-73a).

4. *The Court of Appeals Decisions.* Although the petitions to review the ICC's *Acquisition* and *Abandonment* decisions were briefed separately in the court of appeals, both cases were argued the same day before the same panel. During the briefing, no question was raised concerning the standing of any petitioner in the *Abandonment* case; however, in the *Acquisition* case, respondent ICC challenged the standing of UTU insofar as UTU contested the ICC's decision on the "commodities clause" (49 U.S.C. 10746) claim. However, the ICC's counsel did not contend that UTU lacked standing to raise other claims. The statement by the court of appeals that the ICC challenged UTU's standing to petition for review, 909 F.2d at 189 (App. B, 7a), is incorrect.

The two cases were argued December 14, 1989. On November 28, 1989, a panel of the court of appeals for the D.C. Circuit decided *United Transp. Union v. ICC*, 891 F.2d 908 (D.C. Cir. 1989) *cert. den.* 110 S.Ct. 3271<sup>8</sup> holding that UTU in that case lacked the requisite injury under Article III of the Constitution to challenge the ICC's exemption of interlocking directorates from 49 U.S.C. 11322(a). McLay, a party to the ICC's *Acquisition* case, then moved to intervene and to adopt UTU's brief, but was opposed by the ICC, and the court of appeals on December 13, 1989 denied McLay's intervention as untimely. (App. C, 27a).

A. *Acquisition Decision.* The court of appeals in No. 88-3207 reviewing the ICC's *Acquisition* rulings, on April 16, 1990 concluded that petitioner Simmons (UTU) lacked standing to

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<sup>8</sup>Cf *Broth. of Ry. Carmen (Div. of UTU) v. ICC*, 917 F.2d 1136 (8th Cir. 1990).

challenge the ICC's order, and dismissed the petition for review. 909 F.2d at 186 (App. B, 3a-11-a).<sup>9</sup> The court of appeals held that an anticipated job loss to UTU members upon transfer of the Harvard-Chemung line from C&NW to CCRC met the U.S. Constitution Article III requirement for standing, for UTU members would be injured, but that the prudential requirement with its "zone of interest" consideration was another matter. 909 F.2d at 189 (App. B, 8a):

Simmons alleges that members of the UTU will lose their jobs due to sale of the line. This injury satisfies all three prongs of the Article III standing requirement. However, Simmons must also satisfy prudential limitations on standing."

The court of appeals held that UTU did not meet the prudential test because employee job protection is not within the "zone of interests" to be protected by the Interstate Commerce Act. 909 F.2d at 190 (App. B, 10a).

The court of appeals, relying principally upon *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), stated the presumption in favor of judicial review of agency action is overcome whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme. 909 F.2d at 189-90 (App. B, 8a-9a). Here, the court below found that the interest of rail employees in job protection is not within the "zone of interests" under the Interstate Commerce Act, 49 U.S.C. 10101, *et seq.* The court looked to the rail transportation policy, 49 U.S.C. 10101a, and noted that it was mainly directed to maintaining a safe and competitive

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<sup>9</sup>Although denying standing, the court of appeals stated any future review actions by Patrick W. Simmons should be brought in the name of UTU, rather than following the practice of naming the individual UTU official directly involved and responsible under the organization's constitution. 909 F.2d at 187 n.1 (App. B, 3a-4a n.1).



rail system, and that the only provision specifically dealing with rail employees was contained in subsection 12 dealing with fair wages and safe and suitable working conditions, not job retention. 900 F.2d at 190 (App. B, 10a):

The issue in this case is whether the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, was enacted to protect the zone of interests asserted in this case; i.e., the interest of rail employees in retaining their jobs. 49 U.S.C. § 10505(g) states that "the Commission may not exercise its authority [to exempt transactions] under this section . . . to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle [the Interstate Commerce Act]." Section 10505(a) specifically refers to §10101(a), which lists the overall interests which the Interstate Commerce Act seeks to protect through its rail transportation policy. The policy mainly concentrates on maintaining a safe and competitive railroad system. In contrast to other provisions of the Act, the only stated interest specifically applicable to rail employees is contained at subsection 12: "To encourage fair wages and safe and suitable working conditions in the railroad industry . . . ." The pertinent provisions of the Interstate Commerce Act clearly are not intended to protect a rail employee's interest in retaining his job. Therefore the Act's zone of interests does not encompass the only UTU members' interest which Simmons alleges the ICC's action threatens. Simmons has no standing to petition for review under *Clarke*.

Finally, responding to whether UTU in attacking the ICC's *Acquisition* decision could raise "public interest" arguments

affecting the interests of others — a matter addressed to the court by both UTU and ICC — the court of appeals ruled that once a person has standing, he may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate;<sup>10</sup> but since UTU has not established its own standing, it cannot have standing as a representative of the public interest. 909 F.2d at 190 (App. B, 10a-11a).

*B. Dissent by Judges Cudahy & Ripple.* UTU's petitions for rehearing, with suggestion for rehearing *en banc*, were denied on August 2, 1990, 909 F.2d at 191 (App. B, 12a-13a; App. E, 74a). Judge Cudahy, joined by Judge Ripple, dissented from the denial of rehearing *en banc* in the *Acquisition* case. 909 F.2d at 191-93 (App. B, 13a-17a).

Judge Cudahy observed the decision is of exceptional importance and is the first known instance where standing has been denied to railroad labor in a proceeding in which job elimination is a consideration, and he noted there have been many *thousands* of administrative proceedings and appeals to the courts involving line abandonments, mergers, line sales and the like in which employee representatives have participated without question in both the agency and in court. To assert that job protection lies outside the "zone of interests" arguably protected by the Interstate Commerce Act is to ignore history, even if the principal mode of protection is the imposition of conditions. 909 F.2d at 191 (App. B, 13a-14a):

To assert that job protection lies outside the "zone of interests" arguably protected by the ICA seems to me to ignore the history of railroad regulation for most of the twentieth century. The ICA certainly

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<sup>10</sup>Citing, *Comm'n v. Sanders Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio v. Comm'n*, 316 U.S. 4 (1942); *Sierra Club v. Morton*, 415 U.S. 727 (1972).



recognizes loss of jobs as a crucial problem, even if the principal mode of "protection" is the imposition of conditions of compensation.

The dissent cited the absolute right of railroad representatives to intervene in any proceeding arising under the Interstate Commerce Act (49 U.S.C. Subtitle IV) by means of 49 U.S.C. 10328(a), and the decisions of the Court in *Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519 (1947) and in *American Trucking Assns v. U.S.*, 355 U.S. 141, 144 (1957). 909 F.2d 191-92 (App. B, 14a-15a).

Judge Cudahy stated that the Interstate Commerce Act makes specific provision for the protection of railroad workers in a number of the restructuring schemes, and that it seems implausible that Congress would guarantee employees a role in ICC and in court proceedings, but deny them standing to appeal from one to the other. 909 F.2d at 192 (App. B, 15a-16a):

As I have indicated, the ICA in fact makes specific provision for the protection of railroad workers in a number of railroad restructuring schemes. Further, rail labor's statutory right of intervention alone ought to indicate that employees' interests are not "marginally related to or inconsistent with the purposes implicit in" the Interstate Commerce Act. *Clarke*, 479 U.S. at 399. The whole court ought to weigh the apparently implausible proposition that Congress would by statute guarantee employees a role in ICC proceedings and in the courts, but, without any express provision to that effect, intend to deny them standing to appeal from one to the other.

The dissent concluded with reference to the unanimous Court in *United States v. Lowden*, 308 U.S. 225, 234, 235-39

(1939) that the just and reasonable treatment of rail employees is not only an essential aid to the maintenance of service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

C. *Abandonment Decision*. The court of appeals in its Nos. 88-3211 & 89-1961, reviewing the ICC's *Abandonment* decision, on April 16, 1990 concluded that none of the petitioners — UTU, McLay, or Edenfruit — has standing to challenge the ICC's abandonment exemption for the middle Chemung-Poplar Grove line segment, and dismissed their petitions for review. 900 F.2d 1023 (App. B, 18a-26a). The Court below referred to the companion *Acquisition* decision, and said labor's concern for job losses satisfied the injury requirement for Article III standing, but that such injury is not within the zone of interests protected by the Interstate Commerce Act. 900 F.2d at 1027. (App. B, 25a-26a).

The court of appeals found that the shippers lacked standing because they did not provide evidence or allege that C&NW would likely repair the derailment in the event the abandonment were denied. C&NW has been serving the Poplar Grove shippers by a circuitous route through Beloit, WI to Harvard, IL, which could continue if the abandonment of the Chemung-Poplar Grove were denied. Accordingly, the court of appeals found the shippers do not satisfy the test for standing that the injury is likely to be redressed through a favorable decision against the ICC. 900 F.2d at 1026. (App. B, 24a). The court of appeals added that the petitioners had not alleged environmental damage — only that the ICC did not follow proper administrative procedures — and such is insufficient to establish standing. 900 F.2d at 1027. (App. B, 25a).

## REASONS FOR GRANTING THE WRIT

The court of appeals in denying standing for rail employee organizations to challenge ICC orders involving line sales and abandonments has reversed over 40 years of unbroken precedent.

This is the first known instance in a very long history of employee participation where standing has been denied to railroad labor in proceedings in which job elimination is a consideration, as the dissent recognized. 909 F.2d at 191 (App. B, 13a). The injury-in-fact requirement of the U.S. Constitution, Article III, is satisfied, yet the court of appeals holds that UTU fails the "prudential" test because, in its view, Congress did not intend employee job protection to be within the "zone of interests" covered by the Interstate Commerce Act, U.S.C. 10101, *et seq.*

The implications of the decisions below are appalling. If rail labor cannot challenge ICC decisions involving spin-off of lines by major railroads to newly-formed carriers, and cannot challenge ICC abandonment decisions, then rail labor must seek relief elsewhere. Further, the court of appeals also has denied standing for shippers to challenge a line of abandonment which threatens continuance of service to them.

The court of appeals' mistaken holding ignores the history of railroad regulation for most of the twentieth century.

## **I. THE DECISION OF THE COURT OF APPEALS IN THE ACQUISITION CASE CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE PRACTICE OF LOWER COURTS FOR DECADES.**

1. It has been settled for over 40 years that representatives of railroad employees have an absolute right to be heard in any proceeding under the Interstate Commerce Act that affects the employees. The statute, formerly 49 U.S.C. 17(11), and recodified to its present 49 U.S.C. 10328(a), reads (App. F, 77a).

Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.

This absolute right to participation was confirmed by this Court in *Railroad Trainmen v. B. & O. R. Co.*, 311 U.S. 519 (1947), and railway labor's standing to sue was reaffirmed in *American Trucking Assns. v. U.S.*, 352 U.S. 816 (1956) and 355 U.S. 141, 144 (1957).

Railroad employee representatives may participate in cases before a reviewing court as well as before the ICC. *Railroad Trainmen, supra*, 331 U.S. at 529-30.

In a situation where the requisite injury is present for standing under Article III of the U.S. Constitution, it strains credulity to infer an intent by Congress to give railway labor statutory standing before the ICC, and statutory standing before the courts, but to deny railway labor standing to appeal from the ICC to the courts. Moreover, adversely affected parties have an independent right to judicial review under the Administrative Procedure Act, 5 U.S.C. 702, and also under the Hobbs Act for judicial review of ICC orders. 28 U.S.C. 2342(5), 2344.

There are no known decisions of this Court, or of any other court, which would purport to limit or overrule *Railroad Trainmen, supra*, 909 F.2d at 192 (App. B, 15a). Indeed, both the panel and dissenting opinions recognize that UTU (Simmons) frequently has instituted review actions in the court below. 909 F.2d at 187 n.1 and 191 n.1 (App. B, 4a n.1; 13a n.1).

The court of appeals offered no change of circumstances which might warrant a change in judicial outlook from that which has prevailed over the years with respect to the standing of labor organizations.

2. The court of appeals has made a clear departure from this Court's "zone of interest" test as recently clarified in *Clarke v. Securities Industry Assn.*, 479 U.S. 338 (1987). There is a presumption in favor of judicial review of agency action, 479 U.S. at 399. The test under "zone of interests" for prudential standing is not necessarily whether Congress in the Interstate Commerce Act intended to benefit railroad employees — job protection or otherwise — but whether Congress intended to preclude a particular plaintiff from suing to keep the agency in line with the Congressional enactment. In the final two sentences which were not included in the passage from *Clarke* quoted by the court below, 909 F.2d at 190 (App. B, 9a), this Court made it clear that there need be no indication of congressional purpose to benefit the would-be plaintiff, *Clarke*, 479 U.S. at 399-400:

The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complaint of a particular agency decision. In cases where the plaintiff is not the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests

are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*" (emphasis supp.)

Thus, the issue below should have been whether the UTU's interest in job protection is so "marginally related" or "inconsistent" with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit UTU to sue. However, instead of addressing this matter, the court of appeals said that the "pertinent provisions" of the Interstate Commerce Act are not intended to protect a rail employee's interest in retaining his job, therefore UTU's interest is not within the "zone of interests" for standing.

The court of appeals found only one "pertinent provision" — the "fair wages and safe and suitable working conditions" set forth as one of 15 criteria in the rail transportation policy, 49 U.S.C. 10101a(12). (App. F, 76a). 909 F.2d at 190 (App. B, 10a). However, as pointed out in the dissent, having a job is a necessary prerequisite to "fair wages and safe and suitable working conditions," such that loss of employment would fall within the zone of interests with which the Interstate Commerce Act is concerned. 909 F.2d at 192 (App. B, 16a).

Further, there are a number of other provisions in the Interstate Commerce Act which make specific provision for employee job protection. Some of these are set forth in the Appendix. For example, 49 U.S.C. 10901(e) deals with new line construction. (App. F, 77a-78a); 49 U.S.C. 10903(b)(2) deals with line abandonments (App. F, 78a); 49 U.S.C. 11344(b)(1)(D) deals with carrier mergers and control (App. F, 78a-79a); and 49 U.S.C. 11347 deals with the minimum



job protection required for abandonments and all carrier consolidations covered by 49 U.S.C. 11343 (App. F, 79a).

Additional provisions directed to employee protection are 49 U.S.C. 11103(c)(2) (reciprocal switching); 49 U.S.C. 11125(b)(4) (directed service), 49 U.S.C. 10722 (free passes); 49 U.S.C. 10910(e) (feeder line sales), and 49 U.S.C. 11350(b)(7) (secretary of transportation reports).

The court of appeals should have looked at all of the job protection provisions of the Interstate Commerce Act — not just “fair wages and safe and suitable working conditions.” The court below correctly noted the involved ICC proceedings were “exemption” cases handled under 49 U.S.C. 10505, but section 10505(g)(2) (App. F, 77a) requires that the ICC in an exemption case not relieve a carrier of its obligations otherwise applicable to the provisions from which exemption is sought. Here, job protection is a consideration for the ICC in a line acquisition under 49 U.S.C. 10901.<sup>1</sup> Job protection is also a consideration in an abandonment case under 49 U.S.C. 10903 (App. F, 78a). Thus, job protection is neither inconsistent nor marginally related to UTU’s interest in an acquisition or abandonment exemption.

Finally, the court of appeals erred in not relating job protection to other criteria of the rail transportation policy. Section 10505(a), the exemption provision, refers to the entire 49 U.S.C. 10101a, which embraces safety, efficiency, competition, sound economic conditions, etc. in railroad operations.

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<sup>1</sup>Where acquisition of an existing rail line is involved under 49 U.S.C. 10901, the ICC’s consideration of employee protection stems from the overall “public convenience and necessity” findings and conditions, of which labor is one element. See: *I.C.C. v. Railway Labor Assn.*, 315 U.S. 373, 376-78 (1942); *Black v. I.C.C.*, 762 F.2d 106, 111 (D.C. Cir. 1985); *Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 813-14 (1985).

(App. F, 75a-76a). The dissent below quoted from the opinion of Justice Stone, writing for a unanimous Court in *United States v. Lowden*, 308 U.S. 225, 234, 235-36 (1939), that just and reasonable treatment of railroad employees is not only essential to the maintenance of service, but promotes safety and efficiency. 909 F.2d at 192-93 (App. B, 16a-17a).

Clearly, rail labor's interest in job protection is well within the "zone of interests" as to establish prudential standing.

3. The effect of the ruling below may be to accord a union limited standing to challenge the employee protective conditions imposed or not imposed by the ICC, although this may be an overly generous inference from the decision below. The ICC's argument below — that UTU could not raise the commodities clause (49 U.S.C. 10746) issue — seems directed to limited standing. However, the ICC has a policy — consistently maintained — of not imposing employee conditions in line acquisition cases. The ICC so stated in the instant *Acquisition* case. (App. D, 46a-47a). This Court also has recognized the practice of the ICC not to impose employee protection in acquisition cases, and labor unions no longer even waste their efforts in the attempt. *Pittsburgh & Lake Erie R. Co. v. R.L.E.A.*, 109 S.Ct. 2584, 2590-92 (1989).

Thus, the result of limiting a union's stand to a challenge of protective conditions would effectively deny standing to challenge the ICC's decision in any respect. Yet the validity of an ICC decision involves elements of the rail transportation policy which are interrelated with employment security. See: *United States v. Lowden*, *supra*.

The short and complete answer to the ICC is that once standing to challenge the decision of an administrative agency is established, the petitioner may argue all aspects of the public interest, as recognized below. 909 F.2d at 190 (App. B, 10a). *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).



**II. THE DECISION IN THE ABANDONMENT CASE IS SUBJECT TO THE SAME INFIRMITY AS THE ACQUISITION DECISION AND IS ALSO IN CONFLICT WITH THIS COURT'S DECISION IN *KALO BRICK*.**

1. The court below denied UTU (Simmons) standing to challenge the ICC's *Abandonment* decision, for the same reasons given in denying UTU standing in the companion *Acquisition* case. 900 F.2d at 1027 (App. B, 25a-26a). The same arguments in support of a grant of a writ of certiorari for the *Acquisition* case are equally applicable here for UTU's standing in the *Abandonment* case.

2. The court of appeals' denial of standing for shippers to challenge an ICC abandonment decision is unsupported by any reported authority — ICC or court. The denial of standing was made on the court of appeals' own motion. The decision of the court below is irrational, since it is not within the shippers' knowledge as to how C&NW will serve Poplar Grove in the event the Chemung-Poplar Grove abandonment is reversed *and* C&NW is required to resume service on the Harvard-Chemung segment. Although the ICC opines that C&NW would have no incentive to repair the derailment (which is very minor), meaning that C&NW would operate a train very circuitously to serve Poplar Grove, while at the same time operating a train from Harvard to serve Chemung, which is only 6.5 miles from Poplar Grove. C&NW did not make a definitive statement on the record as to its contingency plans. Moreover, on C&NW's own data, it would be more economical to serve Poplar Grove from the Harvard-Chemung segment. (App. D, 65a-66a n.5).

The court of appeals decision is in conflict with this Court's decision in *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). The ICC's processing of an abandon-

ment request is separate and apart from a shipper's action to recover damages for suspension of service owing to a line washout, or an injunctive action by a public body to restore service. Cf. 450 U.S. at 321-23 & n.9, 330 n.18.

It frequently occurs that a line is out of service pending an ICC abandonment proceeding, and sometimes it makes little sense to order a rail carrier to repair a line if an ICC decision is anticipated. See: *Asbury v. Chesapeake and Ohio Railway Company*, 264 F.Supp. 437 (D.D.C. 1967); *Asbury v. United States*, 298 F.Supp. 589 (W.D.Va. 1969); *I.C.C. v. Baltimore and Annapolis Railroad Company*, 398 F.Supp. 454, 461-63 (D.Md. 1975).

The shippers should not shoulder the burden of proof as to what action C&NW will take if the *Abandonment* and *Acquisition* agency decisions are set aside. The shippers have standing to challenge the abandonment. Clearly, the evidence of record indicates that service on the Poplar Grove-So. Beloit segment was performed at a loss, whereas service on the Harvard-Chemung-Poplar Grove line was performed at a profit. (App. D, 65a-66a n.5).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgments of the United States Court of Appeals in these cases.

Respectfully submitted,

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December 14, 1990



**APPENDIX A**

Supreme Court of the United States

No. A-307

Patrick W. Simmons, McLay Grain Company and  
Edenfruit Products Company,  
Petitioners

v.

Interstate Commerce Commission, et al.

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**O R D E R**

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 30th, 1990.

/s/ John Paul Stevens  
Associate Justice of the Supreme  
Court of the United States

Dated this 20th  
day of October, 1990.

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SUPREME COURT OF THE UNITED STATES

No. A-307

PATRICK W. SIMMONS,  
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

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PATRICK W. SIMMONS, ET AL.,  
Petitioners.

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

---

O R D E R

---

**UPON CONSIDERATION** of the application of counsel  
for the petitioners,

**IT IS ORDERED** that the time for filing a petition for a  
writ of certiorari in the above-entitled cases, be and the same  
is hereby, extended further to and including December 14,  
1990.

/s/ John Paul Stevens  
Associate Justice of the Supreme  
Court of the United States

Dated this 20th  
day of November, 1990

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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No. 88-3207

PATRICK W. SIMMONS,

*Petitioner,*

*v.*

INTERSTATE COMMERCE COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents,*

and

CHICAGO-CHEMUNG RAILROAD CORPORATION,

*Intervening Respondent.*

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On Petition for Review of an Order  
of the Interstate Commerce Commission

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ARGUED DECEMBER 14, 1989—DECIDED APRIL 16, 1990

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Before CUMMINGS, FLAUM, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Petitioner Patrick W. Simmons<sup>1</sup>  
has asked this court to review the action of the Interstate

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<sup>1</sup> Simmons is the Legislative Director of the United Transportation Union (UTU), some members of which are alleged to work for C&NW. Simmons does not even have putative standing to sue

(Footnote continued on following page)

Commerce Commission (ICC), which declined to revoke a class exemption pertaining to the sale of Chicago and North Western Transportation Company's (C&NW's) Harvard-Chemung railroad line. For reasons which follow, the petition is dismissed for lack of standing.

## I. BACKGROUND

For a number of years, C&NW has sought to abandon its Illinois line between Harvard and South Beloit, Wisconsin, a distance of 23.4 miles. C&NW filed its first abandonment application on March 31, 1981, contingent upon its acquiring track rights over a line owned by Chicago, Milwaukee, St. Paul and Pacific Railroad Company (MILW) between Clinton Junction and Beloit, Wisconsin. A number of shippers filed protests. C&NW withdrew its application when MILW indicated it would abandon the Clinton Junction-Beloit line. C&NW next filed for abandonment of the Harvard-South Beloit line on April 21, 1987, again encountering substantial opposition. C&NW again withdrew its application. In permitting C&NW to withdraw its abandonment request for the second time, the ICC stated that in the future C&NW would be required to comply with the system diagram map provisions, and file a notice of intent and updated evidence in any new abandonment application.

Rather than file a new application for abandonment of the Harvard-South Beloit line, C&NW instituted a series of transactions. These efforts were: (1) the transfer of the eastern 3.5-mile Harvard-Chemung segment for operation by Chicago-Chemung Railroad Corporation (CCRC); (2) use

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<sup>1</sup> *continued*

as an individual; he apparently intended to sue on behalf of the UTU. We therefore will treat Simmons as if he sued in an official capacity. *United Transportation Union v. ICC*, 891 F.2d 908, 909 n.1 (D.C. Cir. 1989). Since Simmons frequently litigates these matters, in the future he should file in the name of the appropriate party.



of the out-of-service class abandonment exemption to secure automatic abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 3.4-mile Poplar Grove-South Beloit segment.

CCRC filed a notice with the ICC on September 16, 1987 that it intended to acquire the Harvard-Chemung segment pursuant to an acquisitions exemption adopted by the ICC in 1985. The ICC adopted the exemption pursuant to 49 U.S.C. §10505(a) for all §10901 sales of a rail line to a new carrier. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. §10901*, 1 I.C.C.2d 810 (1985), *aff'd sub. nom, Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). Patrick Simmons, in his capacity as the Illinois Legislative Director of the UTU, filed a petition on September 21, 1987 asking the ICC to stop the acquisition. Simmons made allegations concerning the effect of the sale on C&NW employees; he asserted inefficiency of a 3.5-mile operation; CCRC's viability; the impact on future service by C&NW to shippers located at Poplar Grove; CCRC's relationship to the primary shipper on the line, Seegers Grain Company; and Seegers' concentration of market power vis-a-vis rival grain elevators located on C&NW's line beyond Chemung. The ICC declined to issue an administrative stay, denied Simmons' discovery requests, and declined to revoke the exemption for the line.

With respect to CCRC's operation of the line, the ICC observed that "the line is earning an operating profit, notwithstanding its low traffic volume, and that the traffic volume will increase, perhaps significantly" due to Seegers' projected additional thousand carloads per year. The Commission stated:

Simmon's [sic] generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line.

Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line's shippers.

Decision Denying Petition to Revoke, at 3 (March 14, 1988).

Next, the ICC considered Simmons' argument that the sale of the Harvard-Chemung segment would remove any incentive for C&NW to repair the Poplar Grove-Chemung segment, leaving the Poplar Grove shippers with a more circuitous routing to Chicago than they have been using. The ICC considered it unlikely that C&NW would repair the Poplar Grove-Chemung segment whether or not it retained the Harvard-Chemung segment, considering C&NW's operating losses on the Poplar Grove-Chemung segment. Moreover, the ICC considered the increased mileage for the Poplar Grove traffic to be modest and not likely to jeopardize the quality of service.

The ICC saw no reason to believe that shippers on the Harvard-Chemung line would be adversely affected by the acquisition. The ICC dismissed Simmons' argument that Seegers' control of CCRC would result in a concentration of market power that would adversely affect rival off-line shippers. The ICC noted that rival shippers will continue to be served directly by C&NW and will look to C&NW for competitive rates to Chicago. The ICC noted CCRC's affiliation with Seegers through a small group of common stockholders, but further noted that the mere ownership of a railroad by its principal on-line shipper is not prohibited by 49 U.S.C. §10746, commonly referred to as the "commodities clause." While the statute would not permit CCRC to operate as an alter ego of Seegers, the ICC found no indication that this is the case and saw no reason to investigate further.

Finally, the ICC addressed Simmons' claims that members of the UTU would be injured by the sale:

Simmons claims that CNW employees will be adversely affected and irreparably injured by the loss

of jobs, but he does not provide specific details as to the number of employees affected, if any, or the nature of the effect of the transaction on them. He has not shown a likelihood to prevail on the merits with respect to labor protection nor has he shown that the employees could not be made whole in the event that the Commission imposes labor protection in any exemption revocation.

Decision Denying Administrative Stay, at 3 (Sept. 22, 1987). The ICC rejected Simmons' arguments on behalf of the C&NW employees and on behalf of the public interest.

Simmons filed a petition to reopen, on the grounds that the profitability of the Poplar Grove-Chemung line had not been correctly calculated, that the ICC had applied an unwarranted assumption that new short-line carriers provide better service than their prior owners, and that without discovery concerning the relationship between Seegers and CCRC the ICC could not properly assess the market power argument. The ICC declined to reopen the case. Simmons petitioned this court to review the agency action pursuant to 28 U.S.C. §2321(a). CCRC and C&NW have intervened.

## II. ANALYSIS

The ICC has challenged Simmons' standing to petition for review, arguing that the labor interests represented by Simmons do not fall within the zone of interests protected by the Interstate Commerce Act. Although substantial evidence in the record appears to support the ICC on the merits, we first must determine whether Simmons has standing.

Simmons points to injuries that might be incurred by shippers, competitors, and the public at large. However, Simmons only represents labor interests, specifically the interests of those UTU members adversely impacted by

the ICC's decision.<sup>2</sup> These UTU members must have standing in their own right, for Simmons cannot rest his claim on the interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

Standing is limited both by Article III requirements and prudential concerns. The Seventh Circuit summarized the Article III requirements in *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988):

In order for a party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision.

Simmons alleges that members of the UTU will lose their jobs due to the sale of the line. This injury satisfies all three prongs of the Article III standing requirement. However, Simmons must also satisfy prudential limitations on standing.<sup>3</sup>

One such requirement is the "zone of interest" standing test first articulated in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). See Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.7. The Supreme Court explained the application of the zone of interest test to the

<sup>2</sup> For the UTU (represented by Simmons) to have standing to represent its members, it must show that UTU members would have standing to sue in their own right, that the interests being asserted are germane to the UTU's purpose, and that individual UTU members are not needed to participate. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

<sup>3</sup> Prudential limitations "deny standing as a matter of judicial prudence rather than constitutional demand." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.7.

review of an agency action in *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987):

The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

*Id.* at 399. The Court noted that in past decisions it had "recognized the presumption in favor of judicial review of agency action, but held that this presumption is 'overcome whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme' '." *Id.*, quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984), quoting *Data Processing*, 397 U.S. at 157.

*Clarke* involved a trade association representing securities brokers, underwriters, and investment bankers bringing an action for review of an agency decision under the National Bank Act.

In considering whether the zone of interest test provides or denies standing in this case, we first observe that the Comptroller's argument focuses too narrowly on 12 U.S.C. §36, and does not adequately place §36 in the overall context of the National Bank Act. As *Data Processing* demonstrates, we are not limited to considering the statute under which respondent sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act.

*Clarke*, 479 U.S. at 401. The Court concluded that the respondent in *Clarke* was within the zone of interests intended to be protected by the National Bank Act.

The issue in this case is whether the Interstate Commerce Act, 49 U.S.C. §10101 et seq., was enacted to protect the zone of interests asserted in this case; i.e., the interest of rail employees in retaining their jobs. 49 U.S.C. §10505(g) states that "the Commission may not exercise its authority [to exempt transactions] under this section . . . to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle [the Interstate Commerce Act]." Section 10505(a) specifically refers to §10101(a), which lists the overall interests which the Interstate Commerce Act seeks to protect through its rail transportation policy. The policy mainly concentrates on maintaining a safe and competitive railroad system. In contrast to other provisions of the Act, the only stated interest specifically applicable to rail employees is contained at subsection 12: "To encourage fair wages and safe and suitable working conditions in the railroad industry . . . ." The pertinent provisions of the Interstate Commerce Act clearly are not intended to protect a rail employee's interest in retaining his job. Therefore the Act's zone of interests does not encompass the only UTU members' interest which Simmons alleges the ICC's action threatens. Simmons has no standing to petition for review under *Clarke*.

Simmons argues he has standing as a representative of the public, citing *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4 (1942), and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). However, as the Supreme Court noted in *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972): "Taken together, *Sanders* and *Scripps-Howard* . . . established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate. It was in the latter sense that the 'standing' of the appellant in *Scripps-Howard* existed only as a 'representative of the public interest.' " (Footnotes omitted.)



Since Simmons has not established standing in his own right (as representative of UTU members), he cannot have standing as a representative of the public interest.

For these reasons Simmons' petition for review is dismissed for lack of standing.

DISMISSED.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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No. 88-3207

PATRICK W. SIMMONS,

*Petitioner,*

*v.*

INTERSTATE COMMERCE COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents,*

*and*

CHICAGO-CHEMUNG RAILROAD CORPORATION and  
CHICAGO AND NORTH WESTERN TRANSPORTATION  
COMPANY,

*Intervening Respondents.*

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On Petition for Rehearing and Rehearing En Banc

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REHEARING and SUGGESTION for  
REHEARING EN BANC DENIED—AUGUST 2, 1990

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Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR.,  
CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE,  
MANION and KANNE, *Circuit Judges*.

On May 1, 1990, the petitioner filed a petition for rehearing with suggestion for rehearing en banc. An answer to the petition was requested and joint responses thereto were filed by respondents Interstate Commerce Commission



and United States of America as well as by intervening respondents Chicago and North Western Transportation Company and Chicago-Chemung Railroad Corporation. All of the judges on the original panel voted to deny a rehearing. A judge in regular active service requested a vote on the suggestion for rehearing en banc and the majority of the judges voted to deny an en banc rehearing. CUDAHY and RIPPLE, *Circuit Judges*, voted to grant rehearing. Accordingly, the petition for rehearing is hereby DENIED.

CUDAHY, *Circuit Judge*, with whom RIPPLE, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc:

The present *Simmons* opinion denies standing to railroad labor to challenge the exempt acquisition of a rail line under the Interstate Commerce Act (the "ICA"). This is a decision of exceptional importance since it is the first known instance in a very long history of employee participation where standing has been denied to railroad labor in a proceeding in which job elimination is a consideration. There have, of course, been many thousands of administrative proceedings and appeals to the courts involving line abandonments, mergers, line sales and the like in which employee representatives have participated without question both in the agency and in court.<sup>1</sup> To assert that job protection lies outside the "zone of interests" arguably protected by the ICA seems to me to ignore the history of railroad regulation for most of the twentieth century. The ICA certainly recognizes loss of jobs

<sup>1</sup> Patrick Simmons is the Illinois Legislative Director of the United Transportation Union. Simmons has appeared quite recently before this court. On these occasions, his claims were considered on the merits; no attack was mounted to his standing to seek review of ICC decisions affecting the railroad employees he represents. See *Simmons v. ICC*, 871 F.2d 702 (7th Cir. 1989); *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Simmons v. ICC*, 766 F.2d 1177 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

as a crucial problem, even if the principal mode of "protection" is via the imposition of conditions of compensation.

The full court ought to consider whether the zone of interests test has been applied too narrowly here and without sufficient attention to congressional intent as incorporated in a number of the ICA's provisions applicable to various forms of restructuring rail service. See, e.g., 49 U.S.C. §§ 11347, 10901(e), 10505(g). Rail employees, through their representatives, have a statutory right to participate in ICC proceedings affecting labor interests. 49 U.S.C. section 10328(a) provides:

(a) Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.

The affected employees' right of intervention in both ICC and judicial proceedings was declared more than four decades ago in *Railroad Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519 (1947). Interpreting section 17(11) of the ICA<sup>2</sup>—the predecessor to the current section 10328(a)—the Supreme Court expressly rejected an argument that affected employees could intervene only in proceedings before the Commission but not in court proceedings. The Court said:

Here the meaning of § 17(11) is unmistakable on its face. There is a simple, unambiguous reference to "any proceeding arising under this Act" or, as the House committee paraphrased it, to "any proceedings arising under part I." There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission. The proceedings mentioned are those which arise under this

<sup>2</sup> Section 10328(a) is virtually identical to the former section 17(11), which provided:

Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

Act, an Act under which both judicial and administrative proceedings may arise. . . .

Nor do we perceive any reason of statutory policy why the framers of § 17(11) should have wished to confine the right of intervention by employee representatives to proceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both proceedings, we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way.

331 U.S. at 529-30 (footnotes omitted). The Court reaffirmed its view that employees have standing to intervene in *any* proceeding arising under the Act in *American Trucking Ass'ns v. United States*, 355 U.S. 141, 144, 146-47 (1957). The present opinion cites no decision of the Supreme Court or, indeed, of any other court that purports to limit or overrule *Baltimore & Ohio*.

The panel's opinion correctly notes that there is a presumption in favor of judicial review of agency action. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987) (construing section 10 of the Administrative Procedure Act, 5 U.S.C. § 702). Because of this presumption, the Supreme Court declared in *Clarke* that the zone of interests test "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400 (footnotes omitted). As I have indicated, the ICA in fact makes specific provision for the protection of railroad workers in a number of railroad restructuring schemes. Further, rail labor's statutory right of intervention alone ought to indicate that employees' interests are not "marginally related to or inconsistent with the purposes implicit in" the Interstate Commerce Act. *Clarke*, 479 U.S. at 399. The whole court ought to

weigh the apparently implausible proposition that Congress would by statute guarantee employees a role in ICC proceedings and in the courts, but, without any express provision to that effect, intend to deny them standing to appeal from one to the other.

There is certainly a strong possibility that the panel's construction of 49 U.S.C. section 10101a(12) undermines Congress's intention that the voice of labor be heard. Section 10101a(12) provides that it is the policy of the United States Government to encourage fair wages and safe and suitable working conditions in the railroad industry. Having a job is obviously a necessary prerequisite to "fair wages and suitable working conditions." Loss of employment would therefore seem to fall squarely within the zone of interests with which the ICA and other railroad regulatory and deregulatory legislation is concerned.

Indeed, it has evidently gone unquestioned for decades that the potential impact of ICC decisions upon railroad employees falls within the zone of interests protected by the ICA. More than fifty years ago—long before the coining of the phrase "zone of interests"—Justice Harlan Fiske Stone recognized that the "public concern," as defined by the ICA, encompasses the blow to railroad employees who suffer displacement in the wake of a railroad consolidation. Writing for a unanimous Court, Justice Stone observed:

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

. . .

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not

only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

*United States v. Lowden*, 308 U.S. 225, 234, 235-36 (1939). It appears that the panel in this case may have overlooked this history lesson.

It may be that the ICA does not explicitly provide for the preservation of jobs as a goal in and of itself. But the procedures set up under the Act surely recognize that loss of jobs is an inevitable and unfortunate result of railroad consolidations and abandonments, and, consequently, the Act provides that those affected have a right to be heard. A hearing is all that has been asked of us here.

This case presents a very difficult and important question—one which deserves the consideration of the entire court. I therefore respectfully dissent from the court's denial of rehearing en banc.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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Nos. 88-3211 & 89-1961

PATRICK W. SIMMONS, McLAY GRAIN COMPANY  
and EDENFRUIT PRODUCTS COMPANY,

*Petitioners,*

*v.*

INTERSTATE COMMERCE COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents,*

and

CHICAGO AND NORTH WESTERN TRANSPORTATION  
COMPANY,

*Intervenor-Respondent.*

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On Petitions for Review of the Orders of the  
Interstate Commerce Commission

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ARGUED DECEMBER 14, 1989—DECIDED APRIL 16, 1990

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Before CUMMINGS, FLAUM, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Petitioners Patrick W. Simmons, McLay Grain Company, and Edenfruit Products Company, have asked this court to review the action of the Interstate Commerce Commission (ICC), which declined to revoke the "out-of-service" class exemption for



the abandonment of Chicago and North Western Transportation Company's (C&NW's) Chemung-Poplar Grove line. For reasons which follow, the petitions are dismissed for lack of standing.

## I. BACKGROUND

For a number of years, C&NW has sought to abandon its Illinois line between Harvard and South Beloit, a distance of 23.4 miles. C&NW filed its first abandonment application on March 31, 1981, contingent upon C&NW acquiring track rights over a line owned by Chicago, Milwaukee, St. Paul and Pacific Railroad Company (MILW) between Clinton Junction and Beloit, Wisconsin. A number of shippers filed protests. C&NW withdrew its application when MILW indicated it would abandon the Clinton Junction-Beloit line. A train derailed east of Poplar Grove in November 1986. The resulting damage has never been repaired. C&NW next filed for abandonment of the Harvard-South Beloit line on April 21, 1987, again encountering substantial opposition. C&NW again withdrew its application. In permitting C&NW to withdraw its abandonment request for the second time, the ICC stated that in the future C&NW would be required to comply with the System Diagram Map provisions, and file a notice of intent and updated evidence in any new abandonment application.

Rather than file a new application for abandonment of the Harvard-South Beloit line, C&NW instituted a series of transactions. These efforts were (1) the transfer of the eastern 3.5-mile Harvard-Chemung segment for operation by Chicago-Chemung Railroad Corporation (CCRC); (2) use of the out-of-service class abandonment exemption to secure automatic abandonment of the adjoining middle 6.5-mile Chemung-Poplar Grove segment; and (3) announcement of a forthcoming application to abandon the remaining western 13.4-mile Poplar Grove-South Beloit segment. On March 14, 1988, the ICC denied Patrick Simmons' petition to revoke CCRC's use of the class exemption for non-carrier

acquisition of rail lines with respect to the eastern Harvard-Chemung segment. On September 12, the ICC denied Simmons' motion to reopen its decision not to revoke. Simmons subsequently filed a petition for review in this court. As to the 6.5-mile Chemung-Poplar Grove segment, C&NW invoked the abandonment class exemption for out-of-service lines. This class exemption was available not on the basis of the derailment, but instead because all traffic over the 6.5-mile segment within two years was overhead bridge business. No local business (business from shippers and receivers actually located on the segment) operated on the 6.5-mile segment. The exemption requires only that (1) no local traffic has moved for at least two years; (2) any overhead traffic can be rerouted over other lines; and (3) no user of rail service on the segment has complained. 49 C.F.R. §1152.50 (1989 ed.).

C&NW's notice of exemption asserted that no local traffic was handled on the 6.5-mile segment during the past two years, all overhead traffic was moving over an alternate route over the past one and one-half years, and no formal complaints regarding cessation of local service had been filed. The ICC gave public notice of C&NW's exercise of the exemption, stating petitions for stay and for reconsideration could be filed. McLay Grain Company, Edenfruit Products Company, and Patrick W. Simmons<sup>1</sup> filed a joint petition for stay of the abandonment exemption. McLay Grain Company, situated at Poplar Grove, formerly shipped about 600 cars per year, but has not shipped any traffic by rail since the 1970s. McLay claims it would suffer competitive injury if Seegers Grain Company at Chemung should acquire and McLay should lose rail service. Edenfruit Products Company has a private rail side track and unloading facilities at Poplar Grove. It shipped 15 carloads in 1978, 25 carloads in 1979, but

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<sup>1</sup> Simmons is the Legislative Director of the United Transportation Union (UTU), some members of which are alleged to work for C&NW.



only one carload in the past four years. Since the November 1986 derailment, C&NW has rerouted eastbound Poplar Grove traffic to South Beloit and from there over another route through Beloit, Wisconsin to Harvard, Illinois, adding approximately 32 miles to its Poplar Grove to Chicago operations. Neither Edenfruit nor McLay is situated on the 6.5-mile segment; the two are located a short distance to the west.

The petitioners claim that the abandonment of the Chemung-Poplar Grove segment would prejudice the ultimate disposition of the ongoing Harvard-Chemung proceeding. They also claim the stated use of the abandonment class exemption for the Chemung-Poplar Grove segment constituted an abuse of the class exemption because of its relationship with other C&NW claims for line disposition.

On November 3, 1988, the petitioners filed a petition to revoke and/or for reconsideration of the Chemung-Poplar Grove abandonment class exemption. The ICC denied the stay request by a 3-1 vote. The ICC majority stated that the use of the class exemption is fully consistent with the rail transportation policy so as to allow C&NW to abandon the least profitable segment, such as the one which has been out of service, and that at this point it is speculative whether C&NW will file an application to abandon the Poplar Grove-South Beloit segment or whether abandonment would be authorized. Moreover, if the Poplar Grove-South Beloit abandonment is filed and if it has environmental implications which carry over to the area between Chemung and Poplar Grove, those implications can be addressed at that time. The ICC majority stated it was unclear how petitioners would be prejudiced by the class exemption in the Harvard-Chemung case or a forthcoming South Beloit-Poplar Grove case. The ICC majority also reasoned that the public interest arguments had already been balanced in the class exemption itself.

On May 8, 1989, the ICC denied the petition for revocation and/or reconsideration by a 3-2 vote. The ICC majority concluded that even if C&NW retained the Har-

vard-Chemung line, it would have no incentive to repair the derailment in order to continue the Chemung-Poplar Grove operation. The ICC's decision faulted petitioners for not showing how segmented handling of the Harvard-South Beloit line could subject shippers to market abuse since truck service is available and McLay Grain Company has not used C&NW since the 1970s. The ICC found that the Poplar Grove complaints filed in the 1987 C&NW abandonment case did not constitute a formal complaint within the out-of-service regulations during the prior two-year period because the complaints were against abandonment of the entire Harvard-South Beloit line.

Finally, the ICC addressed the environmental issue. The ICC stated that it may approve a single application without first completing a comprehensive impact statement on all environmentally interrelated regionwide proposals. The ICC defended limiting its environmental review solely to the Chemung-Poplar Grove segment rather than to the Chemung-South Beloit line because Chemung and Poplar Grove are logical termini, the segment is substantially independent in terms of its utility, and allowing the segment's abandonment does not foreclose the opportunity to consider an alternative treatment of subsequently proposed segment abandonments.

Patrick Simmons, McLay Grain Company, and Edenfruit Products Company now file a petition for review with this court. The petitioners urge that we overturn the ICC's orders on a number of grounds: the class exemption as applied in a particular situation is subject to challenge on public interest grounds; the ICC misconstrues the opinions of the Seventh Circuit regarding line segments in ICC abandonment proceedings; the ICC's failure to render findings for the entire Harvard-South Beloit line prior to permitting abandonment of the Chemung-Poplar Grove segment is arbitrary and capricious agency conduct; the ICC's finding regarding abuse of market power is arbitrary and capricious; the ICC's finding on track repairs is arbitrary and capricious; and the ICC's environmental analysis is deficient and requires a remand.

## II. ANALYSIS

Although substantial evidence in the record appears to support the ICC on the merits, we first must determine whether petitioners have standing. No party raised this issue in its briefs. Nevertheless, the court may consider standing on its own motion since it impacts subject matter jurisdiction. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 573 & n.2 (3d Cir. 1980). If the petitioners have no standing, there is no case or controversy, and the court does not have the power to entertain the case under Article III of the Constitution. *City of Evanston v. Regional Transportation Authority*, 825 F.2d 1121, 1123 (7th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

"In order for a party to have standing to bring suit in federal court, three requirements must be met: (1) the party must personally have suffered an actual or threatened injury caused by the defendant's allegedly illegal conduct, (2) the injury must be fairly traceable to the defendant's challenged conduct, and (3) the injury must be one that is likely to be redressed through a favorable decision." *Id.*, citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

The petitioners in this case allege that they will suffer competitive injury by not being able to ship along the abandoned line, whereas their competitors will be able to utilize rail shipment. Furthermore, they challenge the ICC's environmental analysis. Finally, Patrick Simmons alleges that members of the UTU (which he represents) will lose their jobs due to the abandonment of the line.

An allegation of competitive injury is sufficient to satisfy the first prong of the standing test. However, the injury is not traceable to the ICC's action in this case. Petitioners challenge the ICC's Notice of Exemption, its decision denying a stay of the abandonment, and its decision denying petitions for reconsideration and revocation of the abandonment exemption. These actions pertain only to the question of whether C&NW may abandon the line; they

are unrelated to the question of whether C&NW must open the line for use by the petitioners. The November 1986 derailment damaged the 6.5-mile stretch of track which C&NW hopes to abandon. Therefore no traffic used that track for at least a year and one-half before the institution of this action before the ICC. The ICC has held that C&NW would have no incentive to repair the derailment on the track. The petitioners suggest that this finding is inconsistent with the ICC's previous statements that repair of the derailment was merely unlikely. Even if this is true, we note that the petitioners have the burden to allege facts sufficient to support their standing. *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). There is no evidence in the record or even any allegation that C&NW would likely repair the derailment if the request to abandon were denied. Any suggestion that C&NW would reopen the damaged track is pure speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). See also *Warth v. Seldin*, 422 U.S. 490 (1975).

To summarize, the most this court can do in response to petitioners' request is to stop C&NW's abandonment of the track; we cannot force C&NW to repair the damaged line. Since only the repair of the damaged line will suffice to redress the injuries alleged by petitioners, petitioners have failed to meet the third prong of the standing test outlined in *City of Evanston*.

The petitioners also challenge the ICC's environmental analysis. Injury to petitioners' environmental interests is sufficient to satisfy Article III's requirement of an injury in fact. "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*,

405 U.S. 727, 734 (1972). "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.* at 734-35. In *Sierra Club*, the United States Forest Service decided to allow development of Mineral King Valley in California for recreational purposes. The Sierra Club, an organization interested in environmental protection, sued the Secretary of the Interior to stay approval of the project. The Sierra Club claimed it had "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." *Id.* at 730. The Sierra Club alleged the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734. The Supreme Court held that the alleged harm might be an injury in fact to members of the public, but nevertheless denied standing because the Sierra Club never alleged that any of its members would be individually injured by the development.

In this case, the petitioners have not alleged either at the administrative level or on appeal that they will be adversely affected by any environmental damage caused by the abandonment. In fact, the petitioners have not alleged any specific environmental damage; they only argue that the ICC did not use the proper procedure in making its environmental impact findings. Thus the environmental issue cannot provide the basis for the petitioners' standing in this case.

Finally, Patrick Simmons alleges that UTU members will lose their jobs due to the abandonment. This injury satisfies all three prongs of the Article III standing requirement. However, standing is also limited by prudential concerns.<sup>2</sup> One requirement of prudential standing is the "zone of interest" test:

<sup>2</sup> Prudential limitations "deny standing as a matter of judicial prudence rather than constitutional demand." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d §3531.7.

The zone of interest test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

*Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). As this court holds in *Simmons v. Interstate Commerce Commission*, No. 88-3207, the companion to this case, rail employees' interests in retaining their jobs are not within the zone of interests protected by the Interstate Commerce Act.

Therefore none of the asserted interests—competitive, environmental, or labor—can serve as a basis for the petitioners' standing in this case. For this reason, petitioners' action is dismissed for lack of standing.

DISMISSED.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*



**APPENDIX C**  
**UNITED STATES COURT OF APPEALS**  
**For the Seventh Circuit**  
**Chicago, Illinois 60604**

December 13, 1989

By the Court:

PATRICK W. SIMMONS,  
Petitioner

v.

No. 88-3207 INTERSTATE COMMERCE  
COMMISSION and UNITED  
STATES OF AMERICA,  
Respondents

Petition for  
Review of an  
order of the  
Interstate  
Commerce  
Commission

and

CHICAGO-CHEMUNG RAILROAD  
CORPORATION,  
Intervening-Respondent

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR LEAVE TO INTERVENE" filed on December 11, 1989, by McLay Grain Company.
2. "OPPOSITION OF INTERSTATE COMMERCE COMMISSION TO MOTION TO INTERVENE" filed December 12, 1989.

The proposed intervenor fails to set forth compelling reasons to support his untimely motion. *See* Fed. R. App. P. 15 (d)

Accordingly,

IT IS ORDERED that the MOTION FOR LEAVE TO INTERVENE is DENIED as untimely.

\*Counsel for the parties notified by telephone.



**APPENDIX D**

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE

SEP 29 1987

Finance Docket No. 31110

CHICAGO-CHEMUNG RAILROAD CORPORATION —  
EXEMPTION, ACQUISITION AND OPERATION — RAIL  
LINE OF CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY BETWEEN HARVARD  
AND CHEMUNG IN MCHENRY COUNTY, IL

Decided: September 22, 1987

On August 31, 1987, Chicago-Chemung Railroad Corporation (CCRC) filed a notice of exemption under 49 CFR 1150.31 to acquire and operate a 3.5 mile line of the Chicago and North Western Transportation Company (CNW) between milepost 64.0 near Harvard, IL, and milepost 67.5 near Chemung, IL. The transaction includes 0.5 miles of incidental trackage rights, between milepost 64.0 and milepost 63.5. Assertedly this is to enable CCRC to use CNW's passing track for interchanging trainloads of grain. On September 4, 1987, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, filed a petition to reject, stay, revoke, and/or investigate, and on September 11, 1987, the notice of exemption was rejected for failure to contain a consummation date.

On September 16, 1987, CCRC filed a new notice of exemption and included a consummation date. Simmons did not file a new pleading. However, with the exception of the rejection issue, his former pleading applies equally to the new notice, and the time constraints require immediate resolution

of the former stay request. His request for revocation and institution of an investigation will be handled at a later date.

To justify the grant of a petition for stay, a petitioner must demonstrate (1) that there is a strong likelihood that he will prevail on the merits; (2) that he will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *See Washington Metropolitan Area Tourist Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Simmons has not demonstrated the requisite justification for a stay under any of the above criteria.

Simmons has not shown that he is likely to prevail on the merits. He contends that CCRC has not shown itself capable of conducting viable rail operations and alleges that the line is too short for economical operation. Thus, he contends that shippers will suffer poor service and the possible imposition of branch line surcharges. These arguments are speculative at best. The Commission's rules, promulgated in *Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986) (*Class Exemption*), do not require the submission of detailed financial and operating data nor is there anything to suggest that CCRC cannot run a viable operation. To the contrary, if as alleged by Simmons, CCRC is owned by or related to Seegers Grain, an operation of grain elevators, then it would appear that CCRC has every incentive to serve Seegers with viable rail operations.<sup>1</sup> Simmons' allegation that

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<sup>1</sup>Simmons seems to suggest that the line's primary commodity is grain, and that the incidental trackage rights may be used only for "grain trains." On the other hand, he indicates that, while Seegers has elevators at Chemung and Harvard, it has no facilities on the 3.5-mile segment that are connected to the rail line, and he does not refer to the existence of any other grain shippers on the line or using it. It is difficult, under the circumstances, to reconcile the facts with his allegations.

Federal or State funding is involved also suggests that there is adequate funding for the transaction. Simmons notes that the line operates profitably under CNW but offers no reason why profitable operation cannot continue as a short line under CCRC's ownership.

Simmons contends that the transaction may adversely affect shippers on the line as well as certain shippers to the west of the line. Since CCRC may be related to Seegers Grain, and the stated purpose of the 0.5 miles of trackage rights allegedly is for the interchange of grain trains, Simmons contends that CCRC has not shown that it would interchange non-grain traffic for the line's other shippers. Because grain may be the line's primary commodity and receive greater emphasis, there is no reason to believe that CCRC will ignore its common carrier obligation to the line's other shippers. To the contrary, shippers usually benefit when a smaller, lower-cost, locally managed carrier is substituted for a larger Class 1 carrier. In any event, Simmons has not shown reason to believe that non-grain traffic will even be excluded from the trackage rights line.

Simmons also states that the CNW line west of Chemung has been severed by a derailment. He questions whether CNW will make the necessary repairs if it sells the eastern part of the line to CCRC, and he contends that shippers on the CNW line west of the derailment would be adversely affected if the line is not repaired. In this regard, he also notes that CCRC has not indicated whether it would interchange traffic with CNW west of Chemung. There is nothing of record to suggest that CNW will not repair the track disruption. Moreover, this issue is not relevant to the instant transaction. In any event, all shippers both east and west of the derailment, have been receiving service, and there is no indication that any will lose service.

Simmons contends that Seegers' alleged ownership of the

line will concentrate excessive market power in the grain company and will be unfair to competing grain elevators on the CNW line west of Chemung. Simmons has not shown, nor is there reason to suspect that CCRC will discriminate against other affected shippers. However, Seegers' relationship with of CCRC may fall within the purview of 49 U.S.C. 10746, and this issue will be considered by the Commission in connection with its consideration of Simmon's revocation petition. In any event, the likelihood of Simmons prevailing on this issue is very small. See *United States v. South Buffalo R. Co.*, 333 U.S. 771 (1948).

Simmons also contends that the presence of "Chicago" in the new carrier's name indicates that it plans to extend its operations beyond the Harvard-Chemung line and that this would lead to the further concentration of grain marketing. This allegation is speculative and without any substantiation. Moreover, any expansion of CCRC's operations would be subject to Commission approval.

With respect to all of these allegations, appropriate remedies such as a complaint alleging discrimination or failure to provide statutorily required common carrier service as well as petitions to revoke CCR's exemption may be filed at any time. In *Class Exemption, supra*, the Commission stated:

[A]ny transaction could be reversed in whole or in part, and we specifically reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accordance with the provisions of the rail transportation policy.

Simmons has failed to show exceptional circumstances that make these remedies inadequate here.

Simmons claims that CNW employees will be adversely affected and irreparably injured by the loss of jobs, but he does

not provide specific details as to the number of employees affected, if any, or the nature of the effect of the transaction on them. He has not shown a likelihood to prevail on the merits with respect to labor protection nor has he shown that the employees could not be made whole in the event that the Commission imposes labor protection in any exemption revocation. *See Class Exemption, supra*, at 813-815.

While the absence of a stay is unlikely to cause irreparable harm to rail employees and shippers, a stay of the effective date of the exemption is likely to cause harm to CCRC and the shippers it intends to serve. It would delay the start of CCRC's operations and prevent a smooth transition from CNW to CCRC service on September 24, 1987.

Simmons has failed to show that the public interest supports the grant of a stay. The purpose of the *Class Exemption, supra*, is to permit the smooth transition of ownership and operation of small lines to new operators. The public interest is better served by permitting the proposed operation to commence as soon as possible, on its scheduled consummation date. Clearly it is not in the public interest to delay the transaction merely because of speculation that some correctible harm may occur.

Simmons has not demonstrated that a stay of the effective date of the notice of exemption is warranted. The request for stay will be denied.

Because of the prior rejection and refiling, CCRC and CNW may not realize that Simmons' petition to revoke is still under active consideration. They will be permitted to file a response within 20 days from the service date of this decision.

This decision will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered:*

1. The petition for stay is denied.
2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons would have granted the stay request.

(SEAL)

Noreta R. McGee  
Secretary

## INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE

Finance Docket No. 31110

MAR 18 1988

CHICAGO-CHEMUNG RAILROAD CORPORATION —  
EXEMPTION, ACQUISITION AND OPERATION — RAIL  
LINE OF CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY BETWEEN HARVARD  
AND CHEMUNG IN MCHENRY COUNTY, IL

Decided: March 14, 1988

Petitioner, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, seeks revocation of the notice of exemption filed by Chicago-Chemung Railroad Corporation (CCRC) on September 16, 1987. CCRC filed the notice of exemption under 49 CFR 1150.31, *et seq.*, to acquire and operate a 3.5-mile line of the Chicago and North Western Transportation Company (CNW) from milepost 64.0 near Harvard, IL, where it connects with the CNW mainline between Chicago, IL, and Madison, WI, west to milepost 67.5 near Chemung, IL (Chemung line),<sup>1</sup> and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5.

CCRC originally filed the notice on August 31, 1987. Simmons petitioned to reject, stay, revoke, and/or investigate on September 3rd, and on September 11th, we rejected the notice

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<sup>1</sup>The actual purchaser was the McHenry State Bank (Bank), as Trustee under Trust No. 4100. CCRC will be the beneficial owner and operator of the line. The purchase price was \$150,000, and the proposed consummation date was September 24, 1987. CCRC states that the transaction has been consummated.



for failure to state a consummation date. *See* 49 CFR 1150.33 (e)(2). CCRC filed a supplemental notice on September 16th, and Simmons renewed his pleading on September 21st. By decision served September 29th, we denied Simmon's request to stay the notice's effective date. CCRC responded to Simmons' petition on October 19th.

On September 29th, Simmons requested reopening of the stay decision, contending that we had failed to consider his September 21st pleading. Since we had considered all of Simmons' pleadings in that decision, we denied the reopening request in a decision served October 29th, and specifically noted that all of Simmons' pleadings had been considered in our September 29th decision.

Simmons now contends that CCRC's class exemption should be revoked under 49 U.S.C. 10505(d), because application of 49 U.S.C. 10901 to CCRC and the proposed transaction is necessary to carry out the rail transportation policy of 49 U.S.C. 10101a. He questions the viability of the proposed operation and contends that: (1) the operation of the short line will be inefficient; (2) shippers located west of the line will be adversely affected; (3) market power will be concentrated in the hands of Seegers Grain, Inc. (Seegers), a grain company that will control and be served by CCRC; and (4) there will be an adverse impact on employees. Alternatively, if the exemption is not revoked, Simmons requests that we investigate the affiliation between CCRC and Seegers.

In support of his position, Simmons submitted statements from a CNW employee; from Dean Foods Company (Dean Foods), one of the two shippers presently served by the line; and from two shippers at Poplar Grove to the west of Chemung. (CNW service west of Cheumg was and continues to be interrupted by a derailment between Chemung and Popular Grove that occurred in the fall of 1986.)



## PROCEDURAL MATTERS

On October 13, 1987, Simmons petitioned for the discovery and production of Trust No. 4100, the purchase agreement for the Chemung line, and any other agreements between CNW and CCRC or the Bank with respect to the Chemung line or any other CNW line. Simmons contends that the documents are relevant to defining the relationship between CCRC and Seegers but that CCRC has been unwilling to produce them.

On November 18th, CCRC replied to the discovery petition and requested that its reply be accepted as late-filed. It states that, in the rush of preparing replies to Simmons' previous pleadings, it overlooked the discovery request. Assertedly it replied to the discovery request as soon as it realized the oversight.

CCRC states that it furnished Simmons with a copy of the purchase agreement. However, it argues that there is no valid purpose for the production of the overhead trackage rights and interchange agreement between CCRC and CNW because it has already acknowledged its affiliation with Seegers through common, closely-held stockholders. Similarly, it objects to the production of the trust agreement. It contends that the trust serves a legitimate non-transportation purpose and its production would not add or lead to the discovery of new evidence.

On November 24th Simmons responded, indicating that he would not oppose the late-filed reply as long as his discovery petition could be supplemented with the information attached to his response. The attachments included copies of: the purchase agreement; the trackage rights and interchange agreement; (which, Simmons noted it had obtained from other sources, thus obviating that part of its discovery request); and notices by CNW supervisory personnel indicating that CNW considers the line to have been sold to Seegers. Simmons also attached the statement of a CNW employee concerning traf-

fic being handled on the Chemung line by alleged non-railroad personnel of Seegers. CCRC does not oppose Simmons' November 24th response. Accordingly, we will accept Simmons' evidence and also the late-filed reply of CCRC.

Simmons' discovery request will be denied. To a large extent it has been satisfied as shown by the attachments to the November 25th response. To the extent it has not, Simmons has failed to show how information pertaining to other CNW line segments is relevant to this petition to revoke. Further, Simmons has not shown that an examination of Trust No. 4100 will reveal any relevant facts that are not already of record. CCRC has acknowledged its affiliation with Seegers and indicated that most of the line's traffic will belong to Seegers. The affiliation issue involves an allegation that there will be a concentration of market power in violation of 49 U.S.C. 10101a(13) and the commodities clause, 49 U.S.C. 10746. However, it is unlikely, nor has Simmons shown otherwise, that the language of the trust agreement will provide additional insight into the operational relationship between CCRC and Seegers with respect to either section 10101a(13) or section 10746.

## DISCUSSION AND CONCLUSIONS

*Efficiency and viability of the CCRC operation.* Simmons challenges the viability of CCRC's operations. Asserting that a 3.5-mile rail operation is dubious at best, he suggests that non-Seegers' shippers undoubtedly will receive poorer service and perhaps be subjected to branch line surcharges. He notes that the requirement of a CCRC-CNW interchange is an added cost that will affect viability. Under the rail transportation policy of 49 U.S.C. 10101a, he contends that the burden is on CCRC to demonstrate its viability prior to its "substitution" for profitable CNW operations. Dean Foods also sup-

ports an inquiry into the viability of CCRC's proposed service before the substitution is permitted.

The Chemung line was part of a larger rail line extending from milepost 64.0 near Harvard to milepost 87.4 near South Beloit, IL. This line was subject of an abandonment application filed April 21, 1987, in Docket No. AB-1 (Sub-No. 197) *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL.*<sup>2</sup> Because the derailment limited actual rail operations to movements between Harvard and Chemung and between Poplar Grove and South Beloit, CNW was required to and did submit financial operations data for the two line segments as well as data for the Harvard-Poplar Grove segment. Subsequently, however, CNW requested and on August 13, 1987, it was granted permission to withdraw its application.

In the abandonment proceeding, CNW showed that 37 cars were received at Chemung in 1985 and 44 cars were received in 1986. The cars were received by two shippers: Dean Foods, a receiver of plastic pellets used in the manufacture of containers, and McHenry FS, Inc./Growmark, Inc. (McHenry FS) a receiver of materials used to operate a fertilizer blending plant. In addition, the line had an actual operating profit of \$14,438 and \$21,334, respectively, in 1985 and 1986. A lower estimated base year operating profit of \$5,025 was attributed to increased maintenance expenditures

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<sup>2</sup>The line also was the subject of a previous abandonment application in Docket no. AB-1 (Sub-No. 116F), *Chicago & N.W. Transp. Co. — Aband. — in McHenry, Boone, and Winnebago Counties, IL*, filed March 31, 1981. That abandonment was contingent on CNW obtaining trackage rights over the line owned by Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee) between Beloit and Clinton Junction, WI. When Milwaukee decided to abandon the Beloit-Clinton Junction line, CNW requested and on July 21, 1981, was granted permission to retract its abandonment application.

deemed necessary to keep the line at a FRA Class I operating level. Although the consideration of opportunity costs in each of these time frames would have resulted in avoidable losses, CCRC emphasizes that the Chemung line operated profitably on relatively small amounts of traffic. Assertedly, 1,000 additional carloads will be generated from Seegers' two on-line facilities and this new traffic will more than absorb the added interchange costs between CCRC and CNW and result in profitable operations. CCRC also disputes the contention that short-line operations are inherently inefficient and notes that Simmons failed to show why the CCRC line will not be efficient.

In promulgating our rules governing the notice of exemption procedures, we specifically rejected a requirement for the submission of the type of detailed financial and operating data that is required under 49 CFR 1150.4, 5, and 6. *See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986) (*Exemption*). Essentially, we reviewed our experience with the many individual exemption proceedings we had decided and concluded that the vast majority had been processed with far less financial and operating information to the apparent satisfaction of the parties. *Id.* at 812-813, and 817.

Here Simmons has not provided specific evidence to support his challenge to CCRC's viability and there is no evidence before us suggesting that CCRC will not be viable, financially or otherwise. Rather, the evidence shows that the line is earning an operating profit, notwithstanding its low traffic volume, and that the traffic volume will increase, perhaps significantly. Simmons does not dispute CCRC's contention that it will carry an increased traffic volume. To the contrary, he implicitly appears to accept these projections when he argues that the increased traffic volume, resulting from the relationship between CCRC and Seegers, may adversely affect the line's other shippers.

Simmons states that neither of Seegers' facilities are connected to the line by a siding. Seegers has a grain warehouse 100 yards northwest of the line at milepost 66.0 and an elevator 400 yards southeast of the line at milepost 65.0. How Seegers plans to reach the line from these facilities is not shown on the record. It is clear, however, that it intends to use the line heavily.

In his September 21st petition, Simmons states that CCRC has no locomotives or car equipment in the area and questions how it will provide service. This statement was made only 6 days after the purchase agreement was executed. It is contradicted by later evidence submitted by Simmons showing that service to Dean Foods and McHenry FS has continued. Apparently rail service is being performed by Seegers' personnel temporarily until CCRC becomes fully operational. We note that CCRC has already been substituted for CNW in the applicable tariffs. For the long term, the issue of whether CCRC will provide service by purchasing or leasing equipment or by contracting for an operator is a matter left to its own managerial discretion.

Simmons's generalized challenge to the efficiency and viability of short line railroads is not supported by the history of the shortline railroad industry or the facts of this case. It has been our experience that the acquiring firm brings new vitality to the line. Typically, the new operator has closer ties to local communities, will provide better service, and works closely with the line's shippers.

*Impact on shippers west of Chemung.* Simmons asserts that shippers west of Chemung will be affected adversely by a more circuitous routing to Chicago and that CNW will lose any incentive it might have had to repair the line segment between Poplar Grove and Chemung. As a consequence, Poplar Grove

traffic allegedly will not be able to be routed to Chicago over the more direct CCRC routing.

Shippers at Poplar Grove generated 21 and 24 carloads, respectively, in 1985 and 1986. CNW's calculations show that, if Poplar Grove had been served from Harvard, the Poplar Grove to Chemung segment would have produced operating losses of \$12,017 in 1985 and \$18,021 in 1986. Operation of the Poplar Grove to South Beloit portion of the line would also have resulted in operating losses of \$19,421 in 1985 and \$26,361 in 1986. For base year 1987, the operating loss on the Poplar Grove-Chemung segment would have been \$65,901, and the loss on the Poplar Grove-South Beloit segment would have been \$82,628. In view of these unfavorable financial projections, it is unlikely that CNW would have much incentive to repair the Poplar Grove-Chemung segment regardless of whether the Harvard-Chemung segment were sold.<sup>3</sup>

Only three shippers at Poplar Grove expressed any interest in either the earlier abandonment proposal or the proposed acquisition by CCRC. Boone County Service Company (Boone), an affiliate of Growmark and the operator of a fertilizer blending plant, received 20 carloads of fertilizer materials in 1985 and 22 carloads in 1986. Edenfruit Products Company (Edenfruit), a food processor, generated no traffic in 1985 and received one carload in 1986. McLay Grain Company (McLay) operates a grain elevator at Poplar Grove but has used motor carriage exclusively since 1975. If the derailment is not repaired, their Chicago traffic, to the extent there is any, would be routed through Beloit and Clinton Junction to Harvard. This would add approximately 32 miles to their Chicago routing. Neither they nor Simmons has shown that this modest increase

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<sup>3</sup>Other remedies are more appropriate should shippers seek to enforce CNW's common carrier obligation. See 49 U.S.C. 11101(a) and 11701(a).



in mileage would jeopardize in the least the quality of service to Poplar Grove Shippers.

*Impact on Chemung Line shippers.* Simmons suggests that the acquisition will adversely affect Dean Foods. He contends that, since Seegers does not have private sidings, it will use the CCRC line to load its grain cars. Assertedly this will prevent access to Dean Foods' siding. This concern does not appear to be shared by Dean Foods. Its opposition appears to be based on the viability of the new line and loss of service by CNW; it said nothing about access. Nor do we see an access problem. To the contrary, the evidence shows that since November 25, 1987, Dan Foods had received at least three rail shipments via CCRC. We are not aware of any other way that the acquisition would adversely affect any on line shippers. We have received no complaints in this regard.

*Concentration of market power.* Relying on 49 U.S.C. 10101a(13), Simmons contends that Seegers' control of CCRC will result in a concentration of market power that would adversely affect rival grain elevators at Clinton, South Beloit, and Poplar Grove. Simmons refers to only two competing grain shippers, McLay of Poplar Grove and Demeter of South Beloit, and we are not aware of any others. Simmons provides no information about Demeter. As to McLay, Simmons submitted a verified statement from Docket No. AB-1 (Sub-No. 197) where McLay expressed concern that it would suffer a competitive disadvantage if Seegers acquired the Chemung line while it was confined to truck service. McLay indicated that it would like to resume shipping grain by rail if it could obtain competitive rates and that in June of 1986 it requested multigrain rates from CNW. CNW apparently obliged, but for unrelated reasons McLay was unable to begin using rail service. McLay renewed its objections here.

If Simmons is arguing that market power will be concen-

trated in Seegers, his argument is misplaced. Section 10101a(13) of the rail transportation policy is directed at market power of carriers, not shippers. Simmon's novel interpretation of section 10101a(13) would literally preclude shippers from acquiring rail lines, even lines that are slated for abandonment, if there are competing shippers in the vicinity who do not own their own carrier. While every case must be reviewed on its own merits, we cannot agree that this was the intention or even an implication of section 10101a(13). To the contrary, as demonstrated by 49 U.S.C. 10905, the public interest is better served if a line that is proposed for abandonment is acquired (by a shipper or other responsible person), rail operations do not violate the statute. *See also* 49 U.S.C. 10910 and 49 CFRT 1150.21.

In any event, even if Seegers' market power were a relevant concern here, it is unclear how Seegers' relationship to CCRC will result in a concentration of market power vis-a-vis its competitors to the west. These competitors all appear to be served directly by CNW and are dependent on CNW for competitive rates to Chicago. This is also true of Seegers, notwithstanding its relationship with CCRC. CCRC is also dependent on CNW to adopt and publish the joint, proportional or combination rates that will permit its grain traffic to move to Chicago. Moreover, CCRC's rates must cover its operating costs, and Seegers will have the additional expense of loading rail cars without the convenience of direct access. On balance, we do not see how Seegers will obtain market power over its competitors.

To the extent Simmons is arguing that market power is being concentrated in CCRC, we must also disagree. It is unclear how a carrier with a 3.5-mile line can exercise market power over shippers it does not reach. Nor can we agree with Simmons that the mere selection of the name Chicago-Chemung



Railroad Corporation by itself suggests the new carrier has additional expansion plans that would further the concentration of market power. This allegation is entirely speculative and was denied by CCRC. In any event, any further acquisitions would also be subject to Commisison review.

*Commodities clause.* In response to Simmons' allegations relating to concentration of market power and unfairness to competing elevators west of Chemung, we noted in our September 29th decision denying the stay that his revocation request had not shown nor was their reason to suspect that CCRC would discriminate against other affected shippers. Nevertheless, we stated that in connection with Simmons' petition for revocation and investigation we would review Seegers' relationship with CCRC as it pertains to section 10746.

The mere ownership of a railroad by its principal on-line shipper is not prohibited by statute. See *United States v. Lehigh Valley R. Co.*, 200 U.S. 257 (1911). For there to be a violation, it must be shown that CCRC is operating as an "alter ego" of Seegers. *United States v. South Buffalo Ry. Co.*, 333 U.S. 771 (1948).

CCRC acknowledges its affiliation with Seegers through a small group of common stockholders. It observes that no contention has been made that section 10746 will be violated by the affiliation and asserts that a contention of this nature would not be warranted because the affiliated entities will retain their own corporate identities.

Simmons refers to Docket No. 30891, *Paducah & Louisville Ry., Inc. Acq. & Oper. Exemp. — Illinois Cent. G. R. Co.* (not printed), served May 11, 1987 (*Paducah*) where an alleged commodities clause violation is being investigated, but his opposition to this acquisition is based primarily on the alleged

violation of section 10101a(13). His petition neither asserts nor contains any evidence to suggest that the separate corporate identities of these affiliated entities will be breached. Simmons' showing in support of the requested investigation is limited to his allegation that CCRC and Seegers have common stockholders and share the same address, and a memorandum from a CNW roadmaster and a general order from a CNW division manager, both advising rail personnel that the Chemung line was sold to Seegers. Moreover, his discovery has not elicited any information that would shed further light on this issue. In contrast to *Paducah*, where a shipper on the acquired line competes with the shipper affiliate of the carrier and raised this issue on its own behalf, we can find no indication of record to suggest that there is a possible section 10746 violation with respect to this transaction, and no basis to institute an investigation in this regard.

*Impact on labor.* As a further ground for revocation, Simmons argues that the transaction will result in CNW personnel losing employment without being accorded protection. However, even if CCRC were required to file an application under section 10901, CNW personnel would not necessarily be entitled to employee protection. The imposition of labor protection under section 10901 is discretionary. We have a long recognized and judicially approved policy of not imposing labor protection in fledgling carriers. The financial burden associated with their institution of new operations should not be exacerbated by costly labor protection provisions. See *CMC Real Estate Corporation v. ICC*, 807 F.2d 1025 (D.C. Cir. 1986). In the absence of exceptional circumstances, we do not impose these costs upon either the buyer or the seller. *Exemption, supra*, at 815; *Northwestern Pacific Acquiring Corp. and Eureka S. R. Co. — Exemp. from 49 U.S.C. 10901 and 11301* (not printed), served January 8, 1988; and Finance Docket No. 31205, *FRVR Corp. — Exemption Acq. and Oper.*

— *Certain Lines of C&NW Transp. Co. — Pet. for Clarification* (not printed), served January 29, 1988. Simmons has neither alleged exceptional circumstances nor presented any facts to suggest that they may exist.

This action will not significantly affect either the quality of the human environment or energy conservations.

*It is ordered:*

1. The request for discovery, to the extent materials have not already been provided, is denied.
2. The petition to revoke or, in the alternative, to investigate is denied.
3. This decision will be effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett was absent and did not participate in the disposition of this proceeding.

Noreta R. McGee  
Secretary

(SEAL)

## INTERSTATE COMERCE COMMISSION

DECISION	SERVICE DATE
	SEP 16 1988

Finance Docket No. 31110

CHICAGO-CHEMUNG RAILROAD CORPORATION — EX-  
EMPTION, ACQUISITION AND OPERATION — RAIL  
LINE OF CHICAGO AND NORTH WESTERN TRANSPOR-  
TATION COMPANY BETWEEN HARVARD AND  
CHEMUNG IN MCHENRY COUNTY, IL

Decided: September 12, 1988

Petitioner, Patrick W. Simmons (Simmons), Illinois Legislative Director for the United Transportation Union, seeks reopening of our March 18, 1988 decision in this proceeding, on the basis of material error. That decision denied Simmons' request to revoke or, in the alternative, to investigate the notice of exemption filed September 16, 1987, by Chicago-Chemung Railroad Corporation (CCRC), under 49 CFR 1150.31, *et seq.* CCRC filed the notice of exemption to acquire and operate a 3.5-mile line of the Chicago and North Western Transportation Company (CNW) from milepost 64.0 near Harvard, IL, to milepost 67.5 near Chemung, IL, and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5. This line segment is part of a longer line extending west from Harvard beyond Chemung to Poplar Grove and South Beloit, IL. A derailment between Chemung and Poplar Grove in the fall of 1986 interrupted CNW service west of Chemung up to the time the notice of exemption was filed.

Simmons' petition to revoke the exemption focused primarily on the viability of the operation CCRC had proposed. He con-

tended that (1) operation would be inefficient; (2) shippers located west of the line would be adversely affected; (3) market power would be concentrated in the hands of a single grain company (Seegers Grain, Inc.) that would control CCRC; and (4) there would be an adverse impact on employees.

In denying Simmons' petition, we addressed all of these points. We concluded that Simmons had failed to support its viability charge with specific evidence, and that the evidence of record indicated the line was earning an operating profit and would probably experience an increase in traffic volume. Of shippers located west of the line, only three Poplar Grove shippers expressed interest in CCRC acquisition; these had little or no recent rail traffic and would not have been inconvenienced by a slightly longer routing to Chicago, particularly as the Poplar Grove-Chemung derailment might not be repaired. Moreover, we found that considering operations west of Chemung would have produced an operating loss for the longer line. We concluded that it was unclear how Seegers' relationship to CCRC would increase Seegers' market power vis-a-vis its competitors to the west, and that, in any case, the rail transportation policy is concerned with market power of carriers, not of shippers. Finally, we stated that, even if CCRC were required to file an application in lieu of receiving an exemption, we would not have imposed labor protection for CNW employees.

Simmons alleges that we erred in three respects: (1) finding that the segment west of Chemung, to Poplar Grove, was unprofitable; (2) stating, in support of the line's viability, that short line railroads generally provide better service than prior owners; and (3) denying his discovery request regarding the relationship between CCRC and Seegers. He asks that we reopen the decision, grant discovery, issue amended findings, and revoke the exemption or institute an investigation.

In reply, CCRC urges denial of the petition to reopen. It states that, under 49 U.S.C. 10505(d), an exemption cannot be revoked except on a finding that application of a provision of 49 U.S.C. Subtitle IV is necessary to carry out the transportation policy of section 10101a. CCRC alleges that Simmons' first two points have no bearing on the propriety of revocation and that discovery would not have produced relevant information not already admitted by CCRC.

*Profitability of the Chemung-Poplar Grove segment.* In his petition to revoke, Simmons argued that shippers west of Chemung would suffer because sale of the Harvard-Chemung line would eliminate any incentive for CNW to repair the line segment between Chemung and Poplar Grove. We concluded that the line segment from Harvard to Poplar Grove would be unprofitable, and therefore that CNW would be unlikely to make the repairs and continue service to Poplar Grove even if Harvard-Chemung segment were not sold.<sup>1</sup>

Simmons argues that we erred in our method of calculating the unprofitability of the Chemung-Poplar Grove segment. He notes that CNW had not calculated separately the financial data reflecting the theoretical operation of the Poplar Grove-Chemung segment. Accordingly, he objects to the use of financial results for that segment that, in his view, were determined merely by subtracting from the smaller Harvard-Poplar Grove profits the Harvard-Chemung profits, thereby indicating a loss for the Poplar Grove-Chemung segment. He also faults

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<sup>1</sup>The financial data were taken from Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL*, in which CNW sought to abandon its line between Harvard and South Beloit, IL. CNW was required in that proceeding to submit financial operations data for segments between Harvard and Chemung, Harvard and Poplar Grove, and Poplar Grove and South Beloit. That application, which was filed April 21, 1987, subsequently was withdrawn by CNW.



our consideration of the projected operating results for 1987, including the normalized maintenance estimate for that year. Simmons claims that the Harvard-Poplar Grove operations are profitable but that this viable service is being undercut by the sale of the Harvard-Chemung segment.

Although operations between Harvard and Poplar Grove were profitable in 1985 and 1986, the profitability was attributable to Chemung traffic rather than Poplar Grove traffic. Traffic moving beyond Chemung to Poplar Grove produced revenues that were less than the additional costs of operation attributable to that traffic. The only reasonable assessment is a comparison of the Harvard-Chemung operating results with those of the Harvard-Poplar Grove segment. Contrary to Simmons' assertion, we did not merely subtract the Harvard-Chemung profits from the Harvard-Poplar Grove profits. Our analysis was a rational examination of the traffic and financial data of the two segments.

In 1985, traffic moving on the Harvard-Poplar Grove segment amounted to 58 carloads (including 37 carloads that stopped at Chemung). The 58 carloads produced revenues of \$51,332, and, adding \$985 in other revenues, the Harvard-Poplar Grove line had total revenues of \$52,317. The 37 carloads that were delivered at Chemung produced revenues of \$41,330, and other revenues of \$985 increased total revenues to \$42,315 for the Harvard-Chemung portion of the Harvard-Poplar Grove line. Thus, the 21 cars that moved from Harvard, through Chemung, to Poplar Grove produced revenues of \$10,002.

The avoidable costs associated with operation of the Harvard-Poplar Grove segment totaled \$49,896, of which \$27,877 were attributable to the Harvard-Chemung portion of the line. This means that operation of the portion of the Harvard-Poplar Grove line beyond Chemung had avoidable



costs of \$22,019. Therefore, CNW's operation of the line beyond Chemung, to Poplar Grove, resulted in revenue of \$10,002, but its avoidable costs were \$22,019. Consequently the operation beyond Chemung resulted in an operating loss of \$12,017 in 1985. A similar analysis for 1986 showed an operating loss of \$18,021 for the Harvard-Poplar Grove operation beyond Chemung.<sup>2</sup> Moreover, it was not improper to consider the projected 1987 operation of the Chemung-Poplar Grove portion of the line, including the cost of necessary increased maintenance, because it provides an indication of what CNW would be required to spend to continue the Poplar Grove operation.

Simmons also alleges that CNW has twice failed in attempts to abandon the Harvard-South Beloit line. He contends that the line is viable but that the sale of the Harvard-Chemung portion to CCRC threatens that viability. Simmons is in error on both points.

As noted in the prior decision, CNW requested and was granted permission to withdraw its application in both previous abandonment proceedings. No decision was reached as to whether the public convenience and necessity permitted abandonment of the line. Nevertheless, CNW's evidence indicated that the Harvard-South Beloit line had operating losses in 1985 and 1986 and the unprofitability was exacerbated by the substantial economic costs. Simmons offered no figures to contradict those of CNW on this issue.

*General success of short line operations.* In answer to questions raised by Simmons as to the likelihood of CCRC succeeding with its 3.5-mile operation, we pointed out that the

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<sup>2</sup>These avoidable cost/operating loss figures only represent part of a carrier's cost. Other costs may include normalized maintenance and opportunity costs.

history of short line operations indicates that these carriers generally are successful and typically provide improved service to shippers. Simmons challenges this conclusion, stating that he knows of no statistical study justifying that finding. We did not assert that our statement was based on statistical analysis. In part, that conclusion rests upon our experience in reviewing short line sales by carriers (usually class I railroads) seeking to divest themselves of the lines and new entities (usually new entities that become class III carriers upon the acquisition of the line) that desire to acquire and operate them. It is also based on the comments of the users of the line in those cases. These shippers and receivers usually support the acquisition, often on the stated expectation of receiving better service or at least avoiding abandonment. Most of the opposition to short line sales has come from rail labor, rather than from the users of the lines involved.

In addition, the Commission has conducted a study of the acquisition of short lines by new operators. That study entitled *New Short Line and Regional Railroads*, was issued on September 1987, and was the subject of Chairman Gradison's testimony, given October 20, 1987, before the Subcommittee on Surface Transportation of the U.S. Senate Committee on Science, Commerce, and Transportation. The study, prepared by the Commission's Office of Transportation Analysis (OTA), surveyed all 183 short line carriers then in existence, 30 of which operated 5 miles or less. The vast majority of these small carriers anticipated positive future prospects for viability. Among the reasons they gave were (1) development of new business, (2) effective marketing, and (3) services tailored to shippers' needs. This study is available to the public.

In any event, our references to our experience with short line railroads were made only as a response to Simmons'

generalized challenge to the viability of a 3.5-mile line. They did not form the principal support for our finding that this particular line would be viable.

*Discovery.* Simmons requested discovery of certain materials that he alleged would help define the relationship between CCRC and Seegers. As indicated above, Simmons argued that Seegers' control of CCRC would create undue concentration of market power. We denied Simmons' discovery request because CCRC had already acknowledged that it was closely affiliated with Seegers, which will be the chief shipper on the line. We concluded that Seegers' close relation with CCRC would not create a potential for an abuse of market power from CCRC's operation of the line, and, therefore, that discovery would not produce information leading to a different conclusion with respect to market power.

Simmons contends that we erred in denying his discovery request, because he was unable to determine who actually owns and controls the line. He also argues that the denial undercuts our findings of no potential abuse of market power. Simmons raises no new argument here. CCRC's admission of close affiliation with Seegers obviates requiring production of evidence that would lead to the conclusion that a control relationship exists. Simmons' argument about abuse of market power ignores our conclusion that Seegers' competitors are not located on the Harvard-Chemung line and would not be dependent on CCRC's service.

Since Simmons has not shown that our decision of March 18, 1988, contains material error, his petition to reopen will be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered:*

1. The request for reopening is denied.
2. This decision will be effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Simmons did not participate in the disposition of this proceeding.

(SEAL)

Noreta R. McGee  
Secretary

## INTERSTATE COMMERCE COMMISSION

SERVICE DATE

NOV 10 1988

## DECISION

Docket No. AB-1 (Sub-No. 221X)

CHICAGO AND NORTH WESTERN TRANSPORTATION  
COMPANY — ABANDONMENT EXEMPTION — BOONE  
COUNTY, IL

Decided: November 10, 1988

The Chicago and North Western Transportation Company (CNW) filed a notice of exemption on September 26, 1988, under 49 CFR 1152 Subpart F — *Exempt Abandonments*, to abandon its 6.5-mile line of railroad between milepost 67.5 near Chemung and milepost 74 near Poplar Grove, in Boone County, IL.<sup>1</sup> The notice of exemption was served and published in the *Federal Register* on October 14, 1988 (53 FR 40281) and, unless stayed, is scheduled to become effective on November 13, 1988.

On October 24, 1988, a petition to stay was filed jointly by McLay Grain Company (McLay); Edenfruit Products Company (Edenfruit); and Patrick W. Simmons, Illinois Legislative Director for United Transportation Union (Simmons) (collectively petitioners).<sup>2</sup> Petitioners filed a petition for reconsideration and/or revocation of the exemption on November 3, 1988. CNW replied to the stay petition on October 31, 1988.

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<sup>1</sup>This line is a part of a 23.4-mile rail line extending from milepost 64.0 near Harvard, IL, westerly through Chemung and Poplar Grove, to milepost 87.4 near South Beloit, IL. In November 1986, direct service between Harvard and Poplar Grove was terminated as a result of a derailment between Chemung and Poplar Grove.

<sup>2</sup>The Village of Poplar Grove (Village) originally joined with petitioners but later submitted a withdrawal notice attributing its former inclusion to a misunderstanding.

To justify a stay, petitioners must demonstrate: (1) that there is a strong likelihood that they will prevail on the merits; (2) that they will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed by issuance of a stay; and (4) that the public interest supports the granting of the stay. See *Washington Metropolitan Area Tourist Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Petitioners have not demonstrated the requisite justification for a stay under the above criteria. Their petition will be denied.

Petitioners argue that they are likely to prevail on the merits of their administrative appeal and that the notice of exemption will be revoked. Their argument is not persuasive. Petitioners argue that the criteria for an out-of-service line exemption are not justified because Poplar Grove shippers opposed CNW's attempt to abandon its entire Harvard-South Beloit line in 1987.<sup>3</sup> Assertedly, their opposition in 1987 should be viewed as outstanding complaints here and as such should preclude CNW's use of the class exemption.

At issue here is the much shorter 6.5-mile line between Chemung and Poplar Grove. It has been out of service for the requisite 2-year period and therefore meets the basic class exemption criteria. To qualify for the class exemption there can be "no formal complaint filed by a user of rail service on the line . . . regarding cessation of service over the line, 49 CFR 1152.50(b). However, a qualifying complaint must allege that the "carrier has imposed an illegal embargo or other unlawful impediment" to service. No such allegation was made in the shipper protests in Docket No. AB-1 (Sub-No. 197) which petitioners ask to be viewed as complaints. Indeed, peti-

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<sup>3</sup>Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband.* — In *McHenry, Winnebago and Boone Counties, IL.*, filed April 21, 1987, and withdrawn August 13, 1987 (Sub 197).

tioners concede that, when service on the Poplar Grove-Chemung segment was interrupted, CNW acted promptly to provide service via an alternate route.

Petitioners argue that CNW is abusing the out-of-service class exemption because the railroad is exercising it as part of a broader strategy to abandon its entire Chemung-South Beloit line. To the contrary, it is fully consistent with the rail transportation policy, 49 U.S.C. 10101a, to permit CNW to segment its lines and first move forward with the abandonment of those that are the least profitable, such as the one that has been out of service. Indeed, the courts have compelled this approach on judicial review. See *Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098 (7th Cir. 1982).

Petitioners also argue that the Commission's Environmental Assessment is faulty. However, petitioners' quarrel goes merely to the approach that the Commission followed. They do not argue that the Commission has failed to take the requisite hard look at the environmental consequences of abandoning the 6.5-mile segment. While petitioners argue that the Commission should have focused on the environmental effects of abandoning the entire Chemung-South Beloit line, the broader abandonment is not before the agency. At this point, it is speculative whether CNW will file an application to abandon the Poplar Grove-South Beloit segment or whether the Commission will eventually authorize its abandonment. Moreover, if the South Beloit-Poplar Grove abandonment is filed and it is determined that it has environmental implications that carry over to the area between Chemung and Poplar Grove, they can be addressed in that proceeding, *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976). Accordingly, it is not likely that petitioners will prevail on the merits.

Although petitioners contend that the failure to stay the exemption will result in irreparable injury, the fact is that there



are no shippers on the line. overhead traffic has not moved over the line since derailment caused the line to be severed east of Poplar Grove, and CNW exercised its managerial discretion to reroute the traffic. It is unclear how Edenfruit and McLay, the only petitioning shippers, would be irreparably injured if the exemption is permitted to become effective. As noted by CNW, McLay has not shipped any traffic by rail since the 1970's and Edenfruit has shipped one car in the last 4 years. Moreover, a decision granting abandonment is not irreversible; parties who proceed with an abandonment assume the risk that the agency decision may be reversed on appeal and that service may have to be restored. *Busboom Grain Co., Inc. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987).

On the other hand, plainly, CNW would be harmed by a stay. To grant a stay would fly in the face of the Congressional policy (as expressed in the Staggers Act) to expedite abandonments and enable railroads such as CNW to more efficiently allocate their limited resources. See *Busboom Grain Co., Inc. supra*, 830 F.2d at 75. Although it is not incurring operating deficits on the line, CNW continues to incur opportunity costs from the inability otherwise to dispose of it. Specifically, the Boone County Conservation District is seeking to acquire the right-of-way for other public purposes, and CNW seeks to use the track to repair and rehabilitate other lines in its system. Until the abandonment is consummated, CNW may not benefit from either of these opportunities. See *Abandonment of Railroad Lines — Use of Opportunity Costs*, 360 I.C.C. 571 (1979), *aff'd.*, *Farmland Industries, Inc. v. United States*, 642 F.2d 208 (7th Cir. 1981).

Petitioners contend that the public interest warrants a stay. Assertedly a denial of the stay request would prejudice both the judicial review petitioners allegedly intend to seek with regard to our decision authorizing the sale of the Harvard-Chemung segment of the line, Finance Docket No. 31110,

*Chicago-Chemung R. Corp. — Exemp., Acq. and Oper. — Line of C. & N.W. Transp. Co. Betw. Harvard and Chemung in McHenry Cty., IL* (not printed), served March 18, 1988, *aff'd.*, September 16, 1988, stay denied September 29, 1988 (*Chemung*) and the allegedly forthcoming abandonment of the Poplar Grove-South Beloit segment.

Petitioners' public interest arguments are not persuasive. This abandonment was properly filed under the Commission's class exemption procedures for out-of-service rail lines at 49 CFR 1152. In its class exemption decision, the Commission has already balanced the various public interest issues and come down in favor of exempting out-of-service rail lines. *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1987), *aff'd.*, *Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988). Petitioners have offered no argument here, public interest or otherwise, that warrants upsetting the balance struck by the Commission in its class exemption.

It is unclear how judicial review in the *Chemung* case would be prejudiced. *Chemung* is an acquisition. It must stand on its own merits; it is not dependent on CNW's continued operation of the entire South Beloit-Harvard line. Even in the unlikely event that our decision in *Chemung* were to be reversed, the abandonment of this unused 6.5-mile segment would not be precluded. Petitioners have not presented cogent public interest reasons to stay it. Similarly, it is unclear how the exemption of this out-of-service line will prejudice our decision if CNW does seek to abandon the South Beloit-Poplar Grove segment. Overall, we find that the public interest does not support a stay.

It is ordered:

1. The request for stay is denied.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lambole, and Phillips. Commissioner Lambole dissented with a separate expression. Commissioner Simmons did not participate in the disposition of this proceeding.

(SEAL)

Noreta R. McGee  
Secretary

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COMMISSIONER LAMBOLE, dissenting:

I would grant the petition for stay.

In my view, this proceeding may be inappropriate for the out-of-service exemption. The actions of CNW itself are responsible for the fact that there has been no service over this line since 1986. Subsequent to a derailment, CNW chose not to repair the line, but instead to operate circuitously over another line to serve shippers from the west instead of from the east. Then CNW strategically further cemented the fragmentation of the Harvard to Poplar Grove subsegment of the line by sale of the Harvard to Chemung portion to a new operator.

These prior actions combined with this notice of exemption may force shippers located at Poplar Grove to face impending abandonment of the circuitous service that they now receive because their traffic cannot support service over the longer (and previously unprofitable segment), when for the years immediately prior to the imposition of this circuitous route, 1985 and 1986, petitioners maintain that there was an operating profit on the Chemung to Poplar Grove segment.<sup>1</sup>

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<sup>1</sup>See Petition to Stay, page 2. There is no indication in the record of the present economics of service over this segment, i.e., cost of rehabilitation, maintenance, revenues, etc.

Obviously petitioners would not have filed a complaint for service over the embargoed line when the CNW provided a substitute service. Thus the fact that there has been no traffic over this segment for the last 2 years and no complaint for service is entirely due to the actions of CNW and should not be used to bootstrap this phase of the apparent planned abandonment of the entire line.

## INTERSTATE COMMERCE COMMISSION

DECISION                      SERVICE DATE  
   MAY 8 1989

Docket No. AB-1 (Sub-No. 221X)

CHICAGO AND NORTHWESTERN TRANSPORTATION  
COMPANY — ABANDONMENT EXEMPTION — BOONE  
COUNTY, IL.

Decided: April 27, 1989

The Chicago and North Western Transportation Company (CNW) filed a notice of exemption on September 26, 1988, under 49 CFR 1152 Subpart F — *Exempt Abandonments*,<sup>1</sup> to abandon its 6.5-mile line of railroad between milepost 67.5 near Chemung and milepost 74 near Poplar Grove, in Boone County, IL. The notice of exemption was served and published in the *Federal Register* on October 14, 1988 (53 FR 40281) and became effective on November 13, 1988.

On November 3, 1988, McLay Grain Company (McLay), Edenfruit Products Company (Edenfruit), and Patrick W. Simmons, Illinois Legislative Director for United Transportation Union (Simmons) (collectively petitioners) jointly filed a peti-

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<sup>1</sup>See *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) (*Exemption I*); *partially remanded Illinois Commerce Com'n v. ICC*, 787 F.2d 616 (D.C. Cir. 1986) (*Illinois I*); reconsidered in *Exemption of Out of Service Rail Lines*, 2 I.C.C. 2d 146 (1986) (*Exemption II*); *aff'd Illinois Commerce Com'n v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied* 102 L. Ed. 2d 775 (1989) (*Illinois II*).

tion for reconsideration and/or revocation of the exemption.<sup>2</sup> CNW replied on November 23, 1988. We will deny the petition.

This line is the middle segment of a longer CNW rail line, (one of two routes between Harvard, IL and Beloit, WI), extending from milepost 64.0 near Harvard, IL, westerly through Chemung and Poplar Grove, to milepost 87.4 near South Beloit, IL. The longer line (the southern route) was the subject of two prior abandonment applications, both of which were voluntarily withdrawn by CNW.<sup>3</sup> Petitioners claim that his proceeding is part of a CNW scheme to rid itself of the entire southern Harvard-South Beloit line, which consists of three segments: (1) a 3.5-mile Harvard-Chemung line; (2) this middle segment line between Chemung and Poplar Grove; and (3) the remaining 13.4-mile Poplar Grove-South Beloit line, which is identified on the carrier's system diagram map as a candidate for abandonment.

In November 1986, a derailment occurred between Chemung and Poplar Grove, on the middle segment. Therefore, traffic moving between Harvard and Poplar Grove was routed off the line, westerly to Beloit, WI, and then back over

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<sup>2</sup>On November 10, 1988, we denied a stay petition filed by petitioners, who have sought judicial review of our decision in *Patrick W. Simmons, McLay Grain Company and Edenfruit Products v. Interstate Commerce Commission and United States of America*, U.S.C.A., 7th Cir., No. 88-3211, filed on November 15, 1988. The Village of Poplar Grove, which originally had joined with petitioners, later submitted a withdrawal notice, attributing its former inclusion to a misunderstanding. The court proceeding has been held in abeyance pending the issuance of this decision.

<sup>3</sup>Docket No. AB-1 (Sub-No. 116F), *Chicago & N.W. Transp. Co. — Aband. — in McHenry, Boone, and Winnebago Counties, IL*, filed March 31, 1981, and withdrawn July 21, 1981; and Docket No. AB-1 (Sub-No. 197), *Chicago & N.W. Transp. Co. — Aband. in McHenry, Winnebago, and Boone Counties, IL.*, filed April 21, 1987, and withdrawn August 13, 1987.

the northern route through South Beloit to Harvard, adding about 32 miles to the Poplar Grove-Chicago service.

On September 16, 1987, in Finance Docket No. 31110, *Chicago-Chemung R. Corp. — Exemp., Acq., and Oper. — Rail Line of Chicago & N.W. Transp. Co. Between Harvard and Chemung, in McHenry County, IL (Acquisition)*, the Chicago-Chemung Railroad Corporation (CCRC) filed a notice of exemption, under 49 CFR 1150.31 *et seq.*, to acquire and operate the 3.5 -mile segment of the longer line between milepost 64.0 near Harvard and milepost 67.5 near Chemung (and to operate 0.5 miles of incidental trackage rights over the CNW line between milepost 64.0 and milepost 63.5).<sup>4</sup>

As grounds for revocation of the abandonment exemption, petitioners contend that the abandonment constitutes market abuse by CNW and that regulation is therefore necessary to carry out the rail transportation policy (RTP) of section 10101a. Pursuant to 49 U.S.C. 10505(d), the Commission may revoke an exemption, in whole or in part, where necessary to carry out the RTP.

Petitioners argue that the carrier's trifurcation of the line will result in market abuse, since the Harvard-Poplar Grove operation was allegedly profitable prior to the derailment.<sup>5</sup>

<sup>4</sup>On September 29, 1987, Simmons' request to stay the acquisition exemption was denied; on October 28, 1987, his request to reopen the stay denial was denied; on March 18, 1988, his petition to revoke the acquisition exemption was denied; and, on September 16, 1988, his petition to reopen was denied. Judicial review of the Commission's decisions is pending in *Simmons v. ICC*, No. 88-3207, U.S.C.A., 7th Cir., filed November 15, 1988.

<sup>5</sup>The alleged profitability of the Harvard-Poplar Grove line is based upon data submitted in the Sub-No. 197 proceeding, in which CNW showed that the entire line suffered operating losses of \$11,639 in 1985 and \$11,968 in 1986. CNW submitted data that showed the Harvard-Chemung operation realized a profit of \$14,438 in 1985 and \$21,334 in 1986; the Harvard-Poplar Grove operation realized a profit of \$3,507 in 1985 and \$3,313 in



The present abandonment will leave Poplar Grove shippers with rail service only via the Poplar Grove-South Beloit segment, which CNW already has argued is unprofitable. See the application, in Sub-No. 197 and *Acquisition*, March 18, decision, slip op. at p. 4. Therefore, petitioners argue that, although Poplar Grove shippers will be able to protest the possible future abandonment of the Poplar Grove-South Beloit line, if and when an application is filed, they will be penalized by the sequential disposition of the line segments.

Petitioners have not explained how CNW's segmented handling of the Harvard-South Beloit line could subject shippers to a market power abuse here. In *Exemption I*, at p. 892, we concluded that regulation of rail lines that have been out of service for 2 years is not necessary to protect shippers from market abuse, and the court upheld this conclusion in *Illinois II*, 848 F.2d at 1254-55. Market abuse contemplates a carrier's acting to the detriment of shippers where that carrier has a dominant position in the market, but there is ample motor

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1986; and the Poplar Grove-South Beloit operation lost \$19,421 in 1985 and \$26,361 in 1986.

In *Acquisition*, Simmons argued that the Harvard-Poplar Grove line was profitable but that the sale of the Harvard-Chemung line to CCRC would terminate CNW's incentive to repair the derailment between Chemung and Poplar Grove, thus eliminating access to Poplar Grove via Harvard. As we explained in our March 18 and September 16 decisions in *Acquisition*, the Harvard-Poplar Grove profitability was illusory, since it was the result of Harvard-Chemung traffic. Traffic moving beyond Chemung to Poplar Grove produced operating losses of \$12,017 in 1985 and \$18,021 in 1986. Since the Poplar Grove-South Beloit line also operated at a loss, it is clear that Poplar Grove traffic produced operating losses, whether the operation was considered in conjunction with Harvard or with South Beloit. The only profitable operation on the Harvard-South Beloit line was the operation between Harvard and Chemung. We concluded that, even if CNW retained the Harvard-Chemung line, it would have no incentive to repair the derailment in order to continue the money-losing Chemung-Poplar Grove operation.

carrier competition here. In the Sub-No. 197 proceeding, CNW listed 23 regulated motor carriers serving the shippers on the line, and it seems clear that Poplar Grove shippers are using these motor carriers to full advantage. McLay has not used CNW since the 1970's, and Edenfruit has shipped only one carload in the past 4 years. Petitioners claim that there are other Poplar Grove shippers that will be affected, but none of these shippers has opposed this abandonment. This suggests that they do not feel the need for reinstitution of service on the line to the extent petitioners contend. See *Exemption II*, 2 I.C.C.2d at 156, and *Illinois II*, 848 F.2d at 1254-55.

In addition, petitioners ignore the fact that CNW does no longer have a line between Harvard and Chemung since its sale to CCRC. It is difficult to see how CNW can abuse a market on a line which it no longer owns or operates. In sum, we find no merit to petitioners' market abuse assertion.

Furthermore, petitioners argue that CNW's use of the class exemption to abandon 6.5 miles of the 19.9-mile South Beloit-Poplar Grove line is an abuse of the class exemption procedures. They assert that, since CNW's ultimate plan is to rid itself of the entire Harvard-South Beloit line, we should revoke the consummated sale to CCRC,<sup>6</sup> and consider its disposition together with the proposed abandonment, on a consolidated basis. This we will not do. In rationalizing its system, a carrier may ordinarily select the means best suited to its needs and which will produce the most benefits, and it may generally choose the sequence and timing of its requests for approval. Having found a willing purchaser for the profitable

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<sup>6</sup>Petitioners present no basis for their contention that we should revoke the exemption in *Acquisition*. The merits of that exemption were fully discussed in prior decisions and need not be reviewed again. Moreover, this abandonment proceeding is not the proper forum for further review of the *Acquisition* exemption.

Harvard-Chemung line, CNW was free to sell that line, subject to our review.

Nor will we consider the potential abandonment of the Poplar Grove-South Beloit line before an application (or exemption request) has been filed. In the November 10 stay denial, we rejected petitioners' argument that CNW is abusing the class exemption because it was part of its broader strategy to abandon the entire Chemung-South Beloit line. We noted that it is fully consistent with the RTP to permit a carrier to segment its lines and first move forward with the abandonment of those that are the least profitable, slip op. at 2.<sup>7</sup> Petitioners' position would require a carrier to continue operating a clearly unprofitable and, as here, unused and unneeded portion of a line while it decided if, and when, it will seek to abandon the remaining line segment. Such a requirement would foster a wasteful use of carrier resources, which clearly is contrary to the RTP.

Petitioners allege further that regulation of this abandonment is necessary to carry out other aspects of the RTP.<sup>8</sup> They contend that routing Poplar Grove traffic via South Beloit is "vastly circuitous" since it is three times longer and contravenes the RTP goals of: safe and efficient transportation [section 10101a(3)]; sound transportation [section 10101a(4)]; sound economic conditions [section 10101a(5)]; efficient management [section 10101a(10)]; and energy conservation [section 10101a(15)].

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<sup>7</sup>This approach has been consistently judicially endorsed. See, e.g., *People of State of Illinois v. ICC*, 751 F.2d 903, 904-05 (7th Cir. 1985); *People of State of Illinois v. ICC*, 615 F.2d 743, 749 (7th Cir. 1979); *People of State of Illinois v. ICC*, 604 F.2d 519, 528 (7th Cir. 1979). See also *Indiana Sugars, Inc. v. ICC*, 694 F.2d 1098, 1101 (7th Cir. 1982) (court recognized efficacy of line segmentation for abandonment purposes).

<sup>8</sup>We have already concluded, with affirmance of the court, that regulation of lines that have been out of service for at least 2 years is generally unnecessary to carry out the RTP.

The 32-mile circuitry is not excessive and petitioners have not presented any justification for their assertion that the existence of such circuitry in and of itself is sufficient to require revocation of the exemption as contrary to RTP goals.<sup>9</sup> To the contrary, repairing the derailment and reinstituting the money-losing Chemung-Poplar Grove operation would seem to be neither an efficient use of carrier resources nor good management; nor is it necessary to foster sound transportation or sound economic conditions in transportation. Even if the circuitous route were assumed to be somewhat less energy efficient (and we have no evidence so to find), the other RTP considerations addressed above which militate against reinstitution of the Chemung-Poplar Grove operation would outweigh any extra energy use connected with operating over the South Beloit alternate route. Moreover, cumulating traffic over one of two routes between two points creates certain economic efficiencies even if the route selected is the longer of the two.

Finally, petitioners raise two procedural matters. First, they contend that use of the class exemption is inappropriate here because, they allege, there have been complaints filed within the past 2 years. They are in error. The "complaints" to which petitioners refer are the protests filed in the Sub-No. 197 abandonment proceeding. Under 49 CFR 1152.50(b), a railroad may use the class exemption, if "no formal complaint filed by a user of rail service on the line . . . regarding cessation of service over the lines either . . . is pending with the Commission or any United States District Court. . . ." These com-

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<sup>9</sup>The circuitry issue was raised by Simmons in *Acquisition*, but we concluded that neither the shippers (McLay, Edenfruit, and Boone County Service Company) nor Simmons had shown that the increased mileage would jeopardize the quality of service on Poplar Grove traffic. See March 16 decision, slip op. at 4. We also note that a route involving CCRC would require two interchanges. Petitioners have not submitted any energy data regarding the interchanges, and thus overstate any potential energy loss due to circuitry.

plaints must have specifically alleged that the "carrier has imposed an illegal embargo or other unlawful impediment to service." 49 CFR 1152.5C(b).

There have been no such formal complaints filed here alleging an illegal embargo or other unlawful impediment to service. As the record shows, and petitioners acknowledge, CNW has continued to serve Poplar Grove via South Beloit after the derailment.

Nor were such allegations made in the shipper protests filed in the Sub-No. 197 proceeding. Rather, the shippers objected to a proposed cessation of existing service over the entire Harvard-South Beloit line. Since the abandonment application was withdrawn, these objections cannot be viewed as pending complaints. Therefore, we reject petitioners' suggestion that they should be viewed as constructive complaints because it would have been redundant for shippers to have filed complaints with the Commission together with the protests filed in the abandonment proceeding.

As a second procedural issue, petitioners argue that the environmental assessments (EAs) issued by our Section of Energy and Environment on October 24 and 31, 1988,<sup>10</sup> should not have been limited to the Chemung-Poplar Grove segment, but should have evaluated the environmental effects associated with abandonment of the entire Chemung-South Beloit line.<sup>11</sup>

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<sup>10</sup>In a decision served November 13, 1988, the proceeding was reopened for imposition of environmental conditions and a 180-day public use condition.

<sup>11</sup>Petitioners cite four cases in support of their argument: *Swain v. Brinegar*, 542 F.2d 364, 370 (7th Cir. 1976); *Patterson v. Exon*, 415 F. Supp. 1276, 1283-85 (D. Neb. 1976); *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); and *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987). In all four decisions cited by petitioners, the courts have recognized that segmentation is appropriate in certain circumstances, where four factors are satisfied. See *Swain*, 542 F.2d at 369; *Patterson*,

Under the National Environmental Policy Act, the Commission is required to consider the environmental consequences of licensing proposals, such as abandonment requests, submitted for approval. In *Kleppe v. Sierra Club*, 427 U.S. 390, 414 n.26 (1976), the Court recognized that a federal agency may approve a single pending application without first completing a comprehensive impact statement on all environmentally interrelated regionwide proposals. Approval of one application does not commit the agency to approval of any others, and the agency can take into consideration the environmental effects of that application when reviewing the cumulative impact of the remaining proposals. See *id.* 414-15 at n.26. *Accord West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n*, 701 F.2d 632, 651 (7th Cir. 1983). Consequently, we find that it is not necessary here to analyze the environmental effects of the potential larger abandonment in order to evaluate adequately the environmental impact of abandoning the Chemung-Poplar Grove segment now before us.

This action will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered:*

1. The petition for reconsideration and revocation is denied.
2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice

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415 F. Supp. at 1283; *Daly*, 514 F.2d at 1111; *Taxpayers*, 819 F.2d at 299. Three of the factors are satisfied here: (1) the proposed segment has logical termini; (2) it is substantially independent in terms of its utility; and (3) allowing its abandonment does not foreclose the opportunity to consider an alternative treatment of subsequently proposed segment abandonments. The fourth factor — whether the decision irretrievably commits federal funds to closely related projects — is not applicable.



Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

(SEAL)

Noreta R. McGee  
Secretary

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*VICE CHAIRMAN SIMMONS*, dissenting:

Revocation of the out-of-service exemption for this track segment is appropriate and necessary in light of the fact that CNW apparently will abandon the rest of the line. Therefore, I would grant the petition without prejudice to CNW filing an individual abandonment application or petition for exemption and address the impact of the abandonment of this segment on the remaining line. Petitioners have raised significant public interests issues which should be explored further, particularly CNW's failure to repair the damaged segment and its selling of another portion of the line.

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*COMMISSIONER LAMBOLEY*, dissenting:

I would grant the petition for revocation. As I stated in my dissenting separate expression to the decision denying stay<sup>1</sup>, I believe that the out-of-service exemption may be inappropriate in this case.

The actions of CNW itself, in first failing to repair the derailment, then re-routing traffic circuitously over another line, and finally selling the 3.5-mile segment between Harvard and Chemung, made it impossible to reinstitute service on the en-

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<sup>1</sup>Decision not printed, served November 10, 1988.



tire line. These actions have also made it impossible for shippers to oppose the sequence of events which will result, after trifurcation (1. sale, 2. abandonment exemption, and 3. abandonment application), in the abandonment of service by CNW on the entire line for which petitioners maintain there was formerly an operating profit.

I do not believe that CNW should be permitted to bootstrap this phase of the apparent planned abandonment of the entire line.

**APPENDIX E**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE SEVENTH CIRCUIT**  
 Chicago, Illinois 60604

August 2, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge  
 Hon. JOEL M. FLAUM, Circuit Judge  
 Hon. DANIEL A. MANION, Circuit Judge

PATRICK W. SIMMONS, MCLAY	)	On Petitions for
GRAIN COMPANY and EDENFRUIT	)	Review of the
PRODUCTS COMPANY,	)	Orders of the
<i>Petitioners,</i>	)	Interstate Com-
	)	merce Commission.
Nos. 88-3211 & 89-1961 <i>v.</i>	)	
	)	
INTERSTATE COMMERCE COMMISSION	)	
and UNITED STATES OF AMERICA,	)	
<i>Respondents,</i>	)	
and	)	
	)	
CHICAGO AND NORTH WESTERN	)	
TRANSPORTATION COMPANY,	)	
<i>Intervenor-Respondent.</i>	)	

**O R D E R**

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Petitioners, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

## APPENDIX F

### §10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government —

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) To cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of non-compensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10328(a):

Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle —

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

. . .

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 10901. Authorizing Construction and operation of railroad lines

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may

be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

**§ 10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation**

(b)(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interest of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

**§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval**

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

**§ 11347. Employee protective arrangements in transactions involving rail carriers.**

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).